Judicial Review and Supermajority Voting Rules

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Declaration

I certify that the thesis I have presented for the LLM degree of the University of Hong Kong is solely my own work other than where I have clearly indicated that it is the work of others. I declare that my thesis consists of 19,997 words.

Abstract

This thesis focuses on an easily overlooked issue, that is, the voting rules in judicial review of courts. Based on an original collection of voting rules in apex courts, this research adopts a process-tracing and comparative approach to examine the introduction and development of supermajority rules in 13 countries, particularly looking into the context when qualified majority rules emerged, and how courts adapt to the constraints.

In most cases, the adoption of supermajority rules reflects a distrust of judges, courts nevertheless adapt to constraints and find their roles to play. In some countries, the voting thresholds are eventually lowered.

After reviewing the real practices in various countries, this thesis tries to formulate a theory of supermajority rules in judicial review, rebutting some speculations and myths about the rules, and articulating the institutional considerations of voting rules of collegial courts. The theory inevitably touches on the very nature of courts, in other words, what is the judiciary after all. This research finds that comparing and contrasting the civil law and common law traditions would help, and suggests that supermajority rules are not only a political design, but also an ideational sign.

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Chapter 1: Introduction

1.1 Context

After its victory in the 2015 general election in Poland, the ruling party Law and Justice passed a legislation to amend the functioning of the Constitutional Tribunal, requiring, *inter alia*, a two-thirds majority for the Tribunal to hand down rulings. The judicial reform was said to undermine "the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution"[1], transforming the Tribune "into a powerless institution paralysed by consecutive bills"[2].

On the other hand, there are theories speculating that supermajority voting rules are of some advantages, or even more suitable than simple majority rules in judicial review.[3] However, they have not sparked much discussion hitherto, and how particularly would the two-thirds majority rule affect constitutional review is not yet fully explored, sometimes even being taken for granted. Especially in the time of constitutionalism and judicialisation of politics, these arguments deserve our close attention.

1.2 Meaning and Importance of Supermajority Voting Rules in Judicial Review

Two-thirds is one of the common supermajority voting rules, but not the only one. Supermajority, or qualified majority, rules require a decision to be adopted by more than one-half used for majority. A more stringent criteria could be three-quarters.

As supermajority voting rules are undoubtedly more demanding for multi-member courts to reach a decision, and there is a general impression that in vast majority of legal systems what adjudicating in judicial review requires is a simple majority, or an absolute one, and therefore it is unnecessary to have a decision threshold of two-thirds. Yet, as a matter of fact, supermajority voting rules are being used in judicial review in some jurisdictions. A possible reason it is not widely noted is that they are mainly in Latin America, Asia, and Islamic world, almost none of them are in Europe or North America, which are usually studied in comparative constitutional law.

The importance of this research is therefore threefold. First, it would go beyond theoretical discussion of supermajority rules in judicial review[4], and look into empirical evidence in certain legal systems. Second, it would fill in the the gap that is currently under-explored. Third, as judicial review is a crucial topic in constitutional theory, in which the counter-majoritarian debate is always fierce, considering other possible voting rules for courts to hand down rulings could be of help.

1.3 Objectives and Research Method

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[1] European Commission, "Commission Recommendation regarding the Rule of Law in Poland: Questions & Answers", 27 July 2016, available at: europa.eu/rapid/press-release_MEMO-16-2644_en.htm.

[2] Wojciech Sadurski, "Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler", *Hague Journal on the Rule of Law*, 11 (2019), 63–84.

[3] Jeremy Waldron and Jed Handelsman Shugerman are two main proponents, both writing on American law journals. *See* Jeremy Waldron, "Five to Four: Why Do Bare Majorities Rule on Courts?", *Yale Law Journal*, 123 (2014), 1692–1730; Jed Handelsman Shugerman, "A Six-Three Rule: Reviving Consensus and Deference on the Supreme Court", *Georgia Law Review*, 37 (2003), 893.

[4] Shugerman, in his article, regards the six-three rule for the US Supreme Court as merely a "thought experiment".

How much supermajority voting rules affect the effectiveness of courts in judicial review would not be the main question in this research, for qualitatively how judges form a consensus is usually unreachable, and quantitatively there are too many factors so that it would be hard to single out the particular effect of voting rules. Rather, it is to understand why and how supermajority rules are used in certain jurisdictions, and see if there is any model, or even theory, that could be formulated.

Having said that, this research would mainly rely on process-tracing which could generate numerous observations within cases to study the developments of supermajority voting rules in judicial review, including their origins, how they are prescribed by law, changes in the course of time, and how courts generally function.

"Courts" refers to apex courts in this research, such as constitutional courts and supreme courts, because in centralised model only designated courts have the jurisdiction of constitutional review, and in diffuse model cases of judicial review would ultimately come to the highest courts one way and another.

1.4 An Outline

In next chapter, there would be a literature review on supermajority rules in judicial review. Most of the literature are focusing on the problems of bare majority rulings of the US Supreme Court, and consideration of a supermajority voting protocol. They are, therefore, mainly in US's context and in a common law framework. Chapter 2 ends with a review on the study on collegial courts and judicialisation theory ,which would provide us a larger picture to ponder over why voting rules in judicial review matter.

Chapter 3 looks into the background when some jurisdictions adopted supermajority rules in apex courts. Based upon an original collection of voting rules in 196 jurisdictions (see the Appendix to this dissertation), there are at least 13 instances that supermajority rules are or have been used in judicial review or constitutional interpretation. The most common reason of the thresholds is the governments' reservation about or distrust of judges when the courts were being vested with more power than before.

The development of judicial review in these jurisdictions is explored in Chapter 4. In some cases, it has been said that judicial power has been limited because of the supermajority rules. In three jurisdictions, the rules were or are going to be replaced by simple majority rules. While in other cases, courts from time to time make significant decisions and rule against the governments.

Chapter 5 formulates a theory of supermajority rules in judicial review, evaluating when would they result in a weak judiciary, and when would they foster deliberation in collegial courts and therefore bring quality rulings. After all, it is hard to tell whether one way is better than the other, but different views on voting rules in judicial review do reflect different perception of judiciary in a society, in other words, what role people want the courts to play. This thesis ends with a conclusion in Chapter 6.

Chapter 2: Literature Review

2.1 Supermajority Rules in Judicial Review

2.1.1 The Polish Debate

In late 2015, the Poland's ruling party Law and Justice adopted a judicial reform, widely being regarded as a means to curb the power of the Constitutional Tribunal of which most of the judges were appointed by the former government. One of the alterations was to increase the required majority for handing down rulings to two-thirds. Some attention was drawn.

Wojciech Sadurski, a Polish jurist, contends that the two-thirds majority is difficult to achieve, and the judicial reform would paralyse the decision-making of the Tribunal, but without much argument.[5] EU's Venice Commission, on the basis of comments by six legal experts, issued an opinion in 2016, providing mainly two arguments against supermajority rules in constitutional review.[6] First, while supermajority rules are being used in some situations in Europe, such as the German Constitutional Court needs a two-thirds majority to uphold a ban of political parties imposed by the government, and the Constitutional Court of Serbia needs a two-thirds majority of votes of all its judges to initiate a constitutional review, in the absence of any petition, they mostly refer to specific decisions different from usual constitutional review, in which simple majority rules prevail. However, it is a point particularly for the EU's standard of rule of law, and could not tell much about the general desirability or undesirability of supermajority rules.

Second, it argues that it is unfeasible to require a supermajority in abstract review, namely cases initiated by government before legislations come into effect, and at the same time a simple majority in individual cases, for it would lead to an odd situation that provisions are subject to different standards, and their annulment or not would depend whom they are challenged by. Yet why this contradiction could not be resolved by levelling up the threshold of cases appealed by individuals to the same supermajority remains unanswered.

2.1.2 The American Debate

2.1.2.1 Jeremy Waldron and Jed Handelsman Shugerman

In fact, before the Polish constitutional crisis, there has been discussion on voting rules in judicial review in the US. Jeremy Waldron[7] argues against simple majority rules from four perspectives.[8] First, majority decision is decisive, efficient, and easy to apply, but efficiency is not the only criteria for the method of courts to solve disputes, otherwise coin-tossing could also be an option, and therefore other advantages of simple majority rules are important. Second, by Condorcet's Jury

[5] Sadurski (2019).
[6] They are Veronika Bílková, Sarah Cleveland, Michael Frendo, Christoph Grabenwarter, Jean-Claude Scholsen, and Kaarlo Tuori. *See* European Commission (2016).
[7] His hesitation in simple majority rules stemmed from his views on disagreement. *See* Jeremy Waldron, "Deliberation, Disagreement, and Voting", in Harold Hongju Koh and Ronald Slye, ed., *Deliberative Democracy and Human Rights* (New Haven: Yale University Press, 1999). He suggests that judges on a court sometimes end up with reasonable disagreement that even deliberation fails to resolve, and there is nothing else they could do but vote.
[8] Jeremy Waldron (2014).

Theorem, if judges are individually more likely to get their decisions rights than to get them wrong, simple majority rules are then epistemologically reliable for courts to get the right answers, but he shifts the point of attack from the reliability of the decision to its legitimacy, contending that when five judges line up against four judges, adherents of the losing side would probably insist that the five judges are getting it wrong, irrespective of being a majority.

Third, fairness of judges in courts is different from that in electoral or legislative politics, where the losers nevertheless have their vote for elected officials counted equally with others, while it is not the case for losers in five to four judicial decisions. Fourth, it is said that the more judges vote for one side, the more quality the decision is, but Waldron is skeptical about the significant of a narrow majority among judges, and asking why we have reason to defer to them. In a remark, he mentions that it is worthy to think about whether it is good or not to institute a supermajority rule for striking down legislations, although a thorough consideration cannot be found in his piece. Here comes Jed Shugerman.

Shugerman, by recounting the development of judicial review in the US Supreme Court, finds that the number of invalidations of congressional acts by a bare majority increased significantly, suggesting the tradition of deference to Congress has been lost. Those cases of five to four decisions were generally controversial, and eight of them were even overturned fewer than 10 years later. He therefore contends that deviating from the principle that only clear mistakes of the legislature should be overturned by the judiciary is problematic.

Judges, in Shugerman's understanding, are not representatives of the public, nor experts when there is no convincing consensus among themselves. Instead, courts are small-size institutions designed to rule by argument and reason, and their legitimacy depends on its power of reason through mediation and reconciliation. If the Supreme Court cannot reach a broad agreement, being left with a bare majority, then the will of Congress, he asserts, should stand. He argues for a six to three voting rule for the Court to strike down congressional acts. In Shugerman's view, this "thought experiment" may be a safeguard against the court's abuse of its final and supreme power over the law. Just as in history, there were several occasions the Court restrained from bare majority rulings, backing down from confrontations with Congress, in consideration of that supermajority voting rules could be imposed.

For judges, the argument goes, a supermajority rule would not stifle dissent, so long as they are free to express their opinions. It simply flips which side controls the decision, and may even foster the collaboration of more judges in some cases, improving the reasoning of decisions, and leaving more room for compromise and reconciliation of different camps. For legislature, a six to three rule would encourage piecemeal legislation that would be upheld, and discourage broad and aggressive ones that more likely would be struck down.

2.1.2.2 Thayerian Deference and *Chevron* as a Voting Rule

The doctrine of Thayerian deference, named after legal theorist James Bradley Thayer, suggests a "clear beyond doubt" standard of judicial review. In Thayer's words, "whatever choice is rational is

constitutional".[9] Its justifications are manifold. Legislature is more democratic and accountable, an error of congressional act can be cured by congressional repeal, which is much easier than a constitutional amendment that is needed to fix an error of constitutional review, to name but a few. To implement Thayerian deference in the Supreme Court, Evan Caminker suggests two approaches.

The traditional, "atomistic approach" is that individual judges accord some presumption of constitutionality as they consider whether to invalidate a federal statute or not. But psychologically speaking, judges might be inclined to find themselves confident in certain points of view, and reluctant to let themselves be unsure whether the Congress is right or not. Moreover, in group decision making, if some judges are not deference to the legislature, other judges may also give up.

Caminker therefore contends that Thayerian deference could be imposed on the Court through external constraints. In the "protocol approach", multi-member courts make decision as a corporate body, and the voting rule is automatically weighted the scales towards upholding congressional acts, and therefore it has to be a supermajority rule. Although this would result in cases that minority prevails over majority, he defends the rule in two ways. First, it is not biased against the majority in the Court, but biased towards the legislature, another branch of government. Second, minority opinions are not necessarily inferior to those of the majority, and may even be supported by the public.

However, what is the optimal degree of judicial deference is a question unresolved, Caminker therefore describes this idea as exploratory, and refuses to endorse the imposition of a supermajority rule. What Caminker does not, Jacob Gersen and Adrian Vermeule do.[10]

In the landmark case of *Chevron*, the Supreme Court decided that if a statute is silent on or ambiguous about the relevant question, judges, who are not experts in policy, should be deferential to agencies who are in a better position, with their expertise and political accountability, to fill the statutory gaps with reasonable interpretation. But Gersen and Vermeule attest that judges often find one view of the statute correct and the alternative view is erroneous, and thus to discern whether the government's interpretation of a statute is reasonable or permissible is an awkward task.

Similar to Caminker, they prefer a framework institutionalising deference through voting rules to a legal norm that is being internalised by individual judges. According to their proposal, when a litigant challenges agency action as inconsistent with a statute, what judges have to do is, rather than to ponder over the reasonableness of the agency's interpretation, to identify the best interpretation of the statute, yet they can overturn the agency only by a supermajority vote, a six to three vote on the Supreme Court for instance. In spite of some practical difficulties in implementation that could be overcome, such as vote trading and insincere or strategic voting of judges, they maintain that supermajority voting rules as a mechanism of the doctrine of *Chevron* would allow more precise calibration of the level of judicial deference, produce less variance in deference, and yield a higher level of legal certainty overtime.

2.2 Supermajority Rules

[9] Evan H. Caminker, "Thayerian Deference to Congress and Supreme Court Supermajority Rule: Lessons from the Past", *Indiana Law Journal*, 78 (2003), 73–122.
[10] Jacob E. Gersen and Adrian Vermeule, "Chevron as a Voting Rule", *Yale Law Journal*, 116 (2007), 676–731.

Before turning into theories of judicial review, it might be of some help to have a look into the study on supermajority rules in democratic theory.[11] And unsurprisingly, echoes of the above discussion could be found.

A well known example of supermajority voting rules is papal elections, in which a two-thirds majority of the College of Cardinals is required to elect the new pope, a rule of which origin could be traced back to the 12th century, when there were split elections and each side claiming they were the decisive majority. The adoption of supermajority rule was therefore, according to Melissa Schwartzberg, to secure a consensus on the pope-elect that could be legitimately deemed a "true" pope, a decision that could unlikely be challenged by the losing minority. In some sense, this idea is similar to the concern about legitimacy of Waldron.

Moreover, although simple majority may already bring a right answer, Condorcet did not reject supermajority rules in all circumstances. There are two conditions that supermajority rules might be more suitable. First, when people prefer a particular outcome over another, such as freeing the guilty is better than condemning the innocent, more than a simple majority for conviction is thus justified. Second, if it is not urgent, the consequences of reaching a decision rushingly are potentially much graver than deferring. Supermajority rules are not always better, nor always worse.

In her analysis of constitutional amendment, Schwartzberg argues against supermajority rules, for they do not necessarily result in stability, nor sufficiently lead to better deliberation, not to mention that consensus on controversial issues depends on how well the deliberation mechanisms are designed. Applying her ideas in judicial review, biasing judgements through supermajority rules entails the view that opinions of the legislature or the status quo should be presumed to be superior to another, which is undoubtedly contestable.

2.3 Decision-Making in Collegial Courts

Now, consider how judges in multi-member courts deliberate and form consensus. What should be noted from the outset is that there are two different models, namely *ex ante* and *ex post*.[12] In *ex ante* model, a court member called the "reporting judge" is assigned is to prepare a memorandum and a draft opinion before the conference meeting takes place. The reporting judge finalises the draft based on his colleagues' input, on the basis of which the court, as a collective entity, decides the case, not just broadly endorsing some arguments, but approving an actual opinion. The way dissenting judges to make their voice heard is to influence the wording of the court's opinion.

In *ex post* courts, all judges have the opportunity, or responsibility, to read briefs and hear oral arguments before before the conference is convened, in which they would reach a decision on the disposition of the case and assign the task of writing the majority opinion. The articulation of reasons begins through the opinion-writing process, and dissenting judges could voice their disagreement by writing separately, rather than making a compromise with the majority. It is also said that other judges

[11] Melissa Schwartzberg, "Counting the Many: The Origins and Limits of Supermajority Rule" (New York: Cambridge University Press, 2014).
[12] Mathilde Cohen, "Ex Ante versus Ex Post Deliberations: Two Models of Judicial Deliberations in Courts of Last Resort", *American Journal of Comparative Law*, 62 (2014), 951–1008.

may attempt to bargain and negotiate with the writing judge, or their clerks, to see whether they could accept the opinion as it is.[13]

Typical examples of *ex ante* and *ex post* courts are respectively courts of last resort in civil law traditions and the US Supreme Court.

Conceivably, another crucial factor of collegial courts' decision making is dissent. In *per curiam* model where decisions rendered are made by the court acting collectively, dissent is not allowed in some courts of civil law tradition, such as the Italian Constitutional Court. The absence of separate opinions could be deemed as a mechanism encouraging, if not forcing, judges to participate in research the decision collectively, and hence favouring compromise and reconciliation of divergent views.[14]

On the other hand, some judges in multi-member courts may insist "the right to dissent", and deem compromising with the majority as a conformity, which undermines internal judicial independence.[15] So considering, concurring and dissenting opinions might be suggesting a reason why some judges would not try hard to form consensus with other judges on the bench. Should it be the case, *per curiam* decisions sometimes are like *seriatim* ones if all judges insist on their opinions and write separately.[16] To some people, a five to four decision is not unfortunate but a reason to celebrate, for dissenting opinions could leave room for lower court judges to narrow the rulings, and for members of the Court in the future to reverse the holding. Dissent is also said to be essential to expose the deliberative character of the Court's decision-making. From this point of view, voting rules that require a higher level of agreement are not necessarily good for deliberation, in their definition.

Furthermore, forming consensus depends on decision-making protocols as well. In their research, Lewis Kornhauser and Lawrence Sager demonstrate that voting on a case as a whole and voting on issues arising from a case step by step can yield different results in some instances, which they call "the doctrinal paradox".[17] The takeaway for our discussion is that besides voting thresholds, meta-decisions to decide how to aggregate opinions, such as voting procedures and what to be voted on, also matter for collegial deliberation and consensus-forming, might even more importantly in some cases.

2.4 Judicialisation of Politics

Last but not least, it is impossible to talk about judicial review and judicial deference without taking a look on theories concerning the emergence of judicialisation. In a study surveying constitutional review for 204 countries, Tom Ginsburg and Mila Versteeg find empirical support for the theory of political insurance that constitutional review is adopted as a solution to the problem of political uncertainty at the time of constitutional design, safeguarding the future political interest of the

[13] Lee Epstein and Tonja Jacobi, "The Strategic Analysis of Judicial Decisions", *Annual Review of Law and Social Science*, 6 (2010), 341–58.
[14] Marta Cartabia, "Of Bridges and Walls: The Italian Style of Constitutional Adjudication", *Italian Journal of Public Law*, 8 (2016), 37–55.
[15] Bernice B. Donald, "The Intrajudicial Factor in Judicial Independence: Reflections on Collegiality and Dissent in Multi-Member Courts", *University of Memphis Law Review*, 47 (2017), 1123–1146.
[16] M. Todd Henderson, "From Seriatim to Consensus and Back Again: A Theory of Dissent", *The Supreme Court Review*, 2007 (2007), 283–344.
[17] Lewis A. Kornhauser and Lawrence G. Sager, "The One and the Many: Adjudication in Collegial Courts", *California Law Review*, 81 (1993), 1–59.

constitution-makers.[18] In a similar vein, Ran Hirschl argues against the conventional wisdom that constitutional norms diffuse. In his hegemonic preservation thesis, political elites who foresee themselves losing power in the final stages of their rule set up constitutional review to protect a set of constitutionally entrenched interests by placing them outside the realm of ordinary law-making. Both political insurance and hegemonic preservation theories are rooted in domestic political incentives instead of ideational factors.[19]

The one who bridges the attractiveness of constitutionalism and the realistic considerations of political actors is Tamir Moustafa, who suggests that regimes could create independent constitutional courts mandated to uphold the constitution to make a credible commitment for governing legitimacy and attracting foreign investment. After their adoption, constitutional courts may impose genuine constraints on autocratic leaders.[20]

In some fragile democracies, what in judges mind is to make democratic institutions work better and carry out majoritarian wills. Whether judicial power is counter-majoritarian and whether its uses are proper may not be their concern.[21] This may shed some light on our study on voting rules in judicial review.

[18] Tom Ginsburg and Mila Versteeg, "Why Do Countries Adopt Constitutional Review?", *The Journal of Law, Economics, and Organization*, 30 (2013), 587–622.
[19] Ran Hirschl, *Toward Juristocracy* (Cambridge, MA: Harvard University Press, 2004).
[20] Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics and Economic Development in Egypt* (Cambridge: Cambridge University Press, 2007). *See also* Tom Ginsburg, and Tamir Moustafa, ed., *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008).
[21] David Landau, "A Dynamic Theory of Judicial Role", *Boston College Law Review*, 55 (2014), 1501–1562.

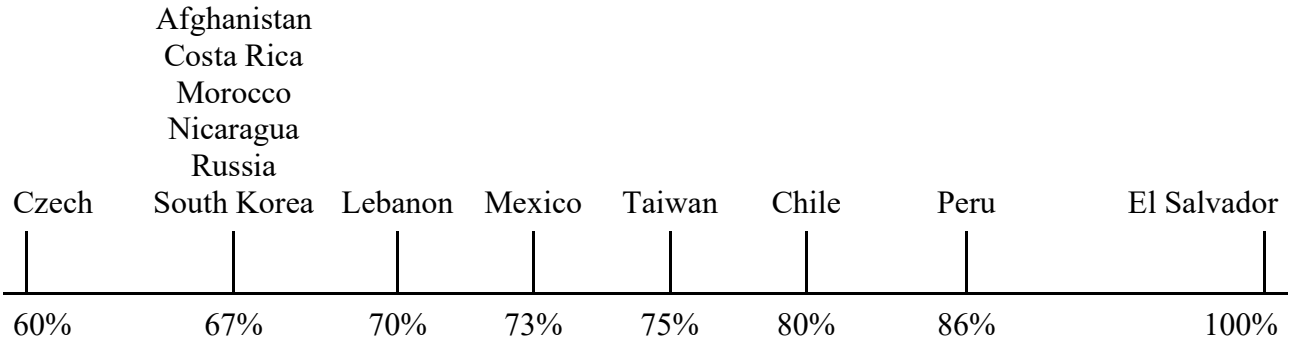
Chapter 3: Adoption of Supermajority Rules in Judicial Review

3.1 An Overview

This research has done a survey on voting rules in judicial review in 196 countries or jurisdictions. Not surprisingly, most of them adopt majority rules. Broadly speaking, they are of two kinds, namely simple majority and absolute majority. In these two rules, there are further variations. For example, in courts where there may be a tied vote, some stipulate that presiding judge has a casting vote, while some others prescribe that the statute stands.

According to the data collected in this study, in 11 jurisdictions supermajority rules are being used in apex courts, and at least two more countries did so not long ago. They are Afghanistan, Chile, Costa Rica, Czech, El Salvador, Lebanon, Mexico, Morocco, Nicaragua, Peru, Russia, South Korea, and Taiwan. The supermajority thresholds range from three-fifths to unanimity, and two-thirds is most common. (as noted in Figure 1) Some of them are regulating the constitutional interpretation of courts or annulment of legislations, while others are in effect for more general judicial power. Of these 11 instances, Taiwan is going to lower the voting threshold from two-thirds to one-half in 2022.[22] At first glance, there seems no obvious pattern, yet it should be remarked that all these countries are with civil law tradition in one way or another, and nearly half of them are in Latin America. Would there be any structural reason is worthy to look into.

Figure 1: Thresholds of Supermajority Rules in Percent Equivalents (As When Adopted)



Some courts adopt supermajority rules for specific cases. For instance, issues concerning the relations between the federal government and regional governments in Iraq need two-thirds supermajority votes to be decided, or the prohibition of a political party in Germany requires consent of at least two-thirds of the judges of the Constitutional Court. For these are purely political disputes that are different from usual constitutional review, they would not be focused on in this research.

Another remark that should be mentioned is how the voting rules are being stipulated. In some, but not many, countries, the voting rules of courts are prescribed by constitutions, signalling that they should be hard, if ever, to change. A more usual case is that the decision-making rules are stipulated in organic laws or congressional acts, together with other provisions on the functioning and organisation of apex courts. In other countries, judicial voting rules are specified in rules of procedure

[22] Whether Taiwan is a sovereign state is contested. For the sake of discussion, the word "country" would be used in this thesis.

of the courts pursuant to certain organic laws or legislations, therefore they are self-regulations more than external controls coming from other branches of governments or politicians. One more situation is that voting rules could neither be found in constitutions, nor legislations, also not some official rules. Among these documents only quorums of multi-member courts have been mentioned. It seems that in these courts the norms of majority rules are presupposed. Or, in some sense, the decision-making process of collegial courts has never been a matter that deserves consideration yet. In either case, it can hardly said to be ideal if judicial decisions, which could be hugely influential, may in some situations depend on voting rules.

3.2 Tension with Governments

All supermajority rules are alike, but each was adopted in its own way. In first bunch of cases to be examined, courts were all at odd with the governments when the voting rules were introduced. In the worst case, it could be regarded as a retaliation of politicians to stop the court from being powerful. But the stories were not that straightforward.

3.2.1 Taiwan's Council of Grand Justices in 1958

In the Constitution of the Republic of China 1947, Grand Justices, who shall be appointed by the President with legislative confirmation, have the power to interpret the Constitution and uniform interpretations of laws and regulations.[23] Other than that, there was no provision or law stipulating the organisation or functioning of the Grand Justices. In 1948, the Grand Justices began functioning in accordance with the rules they made on their own, namely the Regulations Governing the Adjudication of Grand Justices Council, according to which a majority of the total number of judges shall constitute a quorum for meetings, a majority of attending judges shall make a decision, and the presiding judge shall have a casting vote. For constitutional interpretation and constitutional review, a majority of the total number of judges was required.[24]

After the civil war and the retreat of the ROC to Taiwan, there were only 10 Grand Justices out of the total number 17 in 1952, implying that it was easy to fall short of the nine votes that were needed to pass a constitutional interpretation. The Council therefore amended the Regulations to stipulate that two-thirds of the total number of judges in Taiwan shall constitute a quorum, and a majority of the total number of judges in Taiwan shall make a decision, irrespective of whether it was constitutional review or not.[25] In other words, at that time, the lowest numbers of judges to call a meeting and make a decision respectively were six and five. Since then, the Council adjudicated actively, handing down 18 rulings a year in average, until the Interpretation No. 76 in 1957, which changed everything.

In that case, the Council of Grand Justices was asked to decide that among the National Assembly, the Legislative Yuan and the Control Yuan, which one was the genuine parliament that could be entitled to participate in the United Nations. The Council subsequently held that all three collectively were equivalent to the parliamentary body of democratic nations, a ruling that was controversial and irritated members of the Legislative Yuan. Within a month, the Legislative Yuan proposed a motion

[23] Article 79.
[24] Article 12.
[25] "Grand Justices Passed the Regulations in First Meeting", *Central Daily News*, 15 April 1952, p. 1.

to amend the Organic Act of Judicial Yuan, which was originally silent on the functioning of the Council of Grand Justices.

The proposal touched on three issues, which were the requirements of Grand Justice candidates, their terms of office, and the quorum and voting rule. The first draft suggested to increase the voting threshold from a simple majority to two-thirds of attending judges for constitutional review and constitutional interpretation.[26] The final version adopted by the plenary few months later further increased both the quorum and the voting threshold to three-fourths. The immediate effect of this amendment was that, together with a new definition of the term of office, the new Regulations barred the Grand Justices from performing their duties.[27] Not until the selection of new judges in 1958 the Council resumed to function. In that same year, the Legislative Yuan enacted the Grand Justices Council Adjudication Act to reiterate the three quarters rule and lay down protocols concerning constitutional review and the functioning of the Council.

On the one hand, it is widely agreed that the imposed regulations, including the supermajority rule, were a reprisal of the Legislative Yuan. Similar comments were made by observers such as journalists at that time[28] and Grand Justices at a later time[29]. On the other hand, the Interpretation No. 76 was , in some views, filling the gap that the Constitution has not addressed, and therefore the Council should have bewared of overstepping its judicial power.[30] A high voting threshold equivalent to the stringent procedures of constitutional amendment was appropriate, an editorial of an official newspaper of the Kuomintang said.[31]

3.2.2 Russian Constitutional Court in 1994

Another court also being retaliated was the Russian Constitutional Court, which was established in July 1991, with a congressional act instructing a simple majority for decision-making.[32] The Court, which shall be consist of 15 judges, grew out of Mikhail Gorbachev's effort to establish a separate and independent court to adjudicate constitutional conflicts horizontally between branches of government and vertically between central and subnational institutions.[33] However, the Court soon realised that it could hardly not to be political.

In its first three cases, the Court ruled against President Boris Yeltsin once, and stood against the parliament twice. In the challenging case of a ban on Communist Party of the Soviet Union in late 1992, the Court carefully constructed a compromise decision that Yeltsin was within his power to ban the leading organs of the Party, yet the rights of local branches should be protected. Although the judges seemed trying hard to strike an uneasy balance the executive and legislative branches, a constitutional crisis finally came in September 1993, when President Yeltsin laid down a decree to dissolve the parliament who opposed his wide-ranging reforms. At the same day, Chief Justice Valery Zorkin announced an emergency session of the Constitutional Court to examine Yeltsin's actions at a

[26] "Legislative Yuan Proceeded to Review the Bill", *United Daily News*, 22 May 1957, p. 1.
[27] "The Grand Justices Council Called a Discussion Meeting", *United Daily News*, 10 December 1957, p. 1.
[28] "Respecting, Self-Respect, and Being Respect", *United Daily News*, 9 February 1958, p. 1.
[29] Yueh-sheng Weng, "The Prospect of Constitutional Litigation in Taiwan", *Academia Sinica Law Journal*, 1 (2007), 1–62.
[30] "Three Issues Relating to Constitutional Interpretation", *Central Daily News*, 18 September 1958, p. 2.
[31] "On the Term of Office of Grand Justices", *Central Daily News*, 21 May 1957, p. 2.
[32] Constitutional Court of the RSFSR Act, Article 44.
[33] Gordon B. Smith, *Reforming the Russian Legal System* (New York: Cambridge University Press, 1996), p. 133.

press conference, and by a nine to four majority opinion, the Court held that the president had abused his constitutional power and therefore the parliament could either impeach the president or terminate his powers automatically. As in many political crisis, the position of the army was decisive. With the aid of the military who encircled the parliament building, Yeltsin held power and Zorkin was persuaded to resign his chairmanship. President Yeltsin subsequently issued a decree to write a new constitution and suspend the Constitutional Court.[34]

The Law on the Constitutional Court enacted in July 1994 which enlarged the Court from 15 to 19 seats and required a two-thirds supermajority to issue a decision of constitutional interpretation[35] was undoubtedly a vengeance of the president, who tighten his grip on power over the Court, for at that time there were 13 judges on the bench, Yeltsin could pack the Court by nominating six new members. With the new voting rule, so long as there were at least seven judges who were in favour of the government, the Court would not be as threatening as before.

Nonetheless, it would be too simple to take the Law merely as an instrument of the president. In fact, pro-Yeltsin parties were not controlling the newly established State Duma, by which the Law had to be approved, after the December 1993 election, for in it Liberal Democratic Party and Communist Party which were both critical to Yeltsin's reforms won many seats. Furthermore, the legislation was drafted with significant input from the then acting Chief Justice, Nikolai Vitruk, and some other sitting justices.[36] Why they would acquiesce in the new law with a supermajority requirement may be of two reasons. First, Vitruk, a former professor of law, was not align with Zorkin in the September ruling, in which he and three more judges on the bench voted against the interpretation. In his own words, "the Constitutional Court should act as a court of law and should not behave as a crew of firefighters or paramedics", it could be said that among justices perhaps there was no consensus on the role of the Constitutional Court yet at that time.[37] Second, Vitruk was trying to assure that the ambitious president would not abolish the Constitutional Court altogether, an option that was already hinted in his decree. In this sense, a re-evaluation of political reality and a compromise on judicial power of the Court might serve the purpose of institutional survival.[38]

3.2.3 Nicaraguan Supreme Court in 1990

In a similar way, when the Nicaraguan Supreme Court adopted a supermajority rule in 1990, it was in tension with the government. According to the Constitution that went into effect in 1987, there should be at least seven judges in the Supreme Court.[39] Presumably the president could pack the Court by increasing the total seats on the bench. This possibility was in fact raised two years before the court-packing really took place when there was political alternation in 1990.[40]

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[34] For the 1993 Russian Constitutional Crisis, *see ibid.,* p. 133–139, and *generally* Alexei Trochev, Judging Russia: The Role of the Constitutional Court in Russian Politics 1990–2006, (New York: Cambridge University Press, 2008), chapter 4.
[35] Article 72.
[36] Carla L. Thorson, *Politics, Judicial Review, and the Russian Constitutional Court* (Basingstoke: Palgrave Macmillan, 2012), p. 44.
[37] Alexei Trochev (2008), p. 93.
[38] Herbert Hausmaninger, "Towards a New Russian Constitutional Court", *Cornell International Law Journal*, 28 (1995), 349–386.
[39] Article 163.
[40] Christopher P. Barton, "The Paradox of a Revolutionary Constitution: A Reading of the Nicaraguan Constitution", *Hastings International and Comparative Law Review*, 12 (1988), 49–136.

At the time when Violeta Chamorro of the National Opposition Union assumed office of president in 1990, all seven judges in the Court were appointed by the leftist former president. Most likely they, or Sandinista judges so to speak, were ideologically different from Chamorro, who therefore undoubtedly lacked confidence in them. Plus two justices were going to step down sooner or later, a real risk of court-packing was around the corner. Acting in a way to prevent the Court from being reconstituted overwhelmingly, the remaining judges took "protective action" to propose an increase of the number of judges from seven to nine so that the president could nominate four new members into the Court. They also adopted an internal rule that the consent of at least six out of nine judges was needed for adjudication. As a result, neither the Sandinista five nor the four appointed by the new government could dominate the institute.[41]

In the eyes of pro-Sandinista leftists, a supermajority rule demanding some degree of consensus could prevent the Supreme Court from being too partisan, on the other hand it meant that the Court might since be incapable to rule on controversial issues, as a former judge of the Court pointed out. Clues could be found in documents of the US Department of State, which reiterated that although in the nine-member Court Sandinista appointees outnumbered Chamorro appointees, "but neither group has the six-vote majority necessary to decide cases".[42]

3.3 Entrusting yet Mistrusting

The second type of cases share a common feature that at the time when supermajority rules were introduced in judicial review, the courts were actually being empowered. Eight instances could be identified, and five of them are in Ibero-America.

3.3.1 Costa Rica, Peru, and Chile: From *inter partes* to *erga omnes*

Begin with Costa Rica, for its adoption of supermajority rule could be traced back to as early as 1938. By 1930s, although the Supreme Court adjudicated in cases concerning constitutionality of statutes from time to time, its stands were sometimes contrary to those of the Congress and the government. For instance, the Court once granted habeas corpus and ordered a release pursuant to the Constitution which recognised the right of habeas corpus, its order was ignored by the president. Whether it had a final say on constitutional questions was apparently not beyond dispute. Furthermore, its decisions were not always followed by judges in lower courts, and therefore how legally binding its constitutional decisions were remained to be clarified.[43] In 1938, the Organic Law of the Judicial Power was laid down, which made clear that the inapplicability of laws, decrees, orders, or resolutions shall be determined by the Supreme Court. For its part, the newly amended Code of Civil Procedure enabled litigants to ask the Supreme Court to decide the law at stake was unconstitutional and therefore could no longer be applied by a new procedure called the action of unconstitutionality, which shall be of *erga omnes* effect. Once the judicial power was consolidated, the threshold for the

[41] Michael B. Wise, "Nicaragua: Judicial Independence in a Time of Transition", *Willamette Law Review*, 30 (1994), 519–579.
[42] *Annual Human Rights Reports Submitted to Congress by the U.S.Department of State* (1991), p. 678.
[43] Robert S. Barker, "Judicial Review in Costa Rica: Evolution and Recent Developments", *Southwestern Journal of Law and Trade in the Americas*, 7 (2000), 267–290.

Court to annul laws was raised at the same time, from a majority to a two-thirds supermajority. It is said that the new threshold was adopted in part to reduce the odds that laws would be repealed for policy reasons rather than unconstitutionality, "as many Costa Ricans believed was then occurring in the United States".[44] After the 1948 Civil War, a Constituent Assembly was called, in which 45 elected representatives worked on drafting a new constitution. Subsequently the supermajority rule was enshrined in the 1949 Constitution.[45]

Another instance is Peru, which came to constitutionalism after 10 years of military rule. In 1978, the military leaders set to transfer power to a civilian government, and a general assembly consisted of 100 representatives therefore commenced to work on a new constitution. The General Assembly, first, decided that there should be a mechanism protecting fundamental rights prescribed by the forthcoming Constitution, rather than letting the government to self-regulate as in the previous Constitution[46], nor delegating this important responsibility solely to the Supreme Court, which had been subordinated to the military government and therefore the drafters distrusted in its ability to act as an effective check and balance[47]. A new organ named as Tribunal of Constitutional Guarantees was set forth with the power to rule that laws passed by the Congress were unconstitutional, and to adjudicate in cases of habeas corpus and amparo.[48] The Constitution enacted in 1979 stipulated that the Tribunal shall be composed of nine judges, three elected by each of the executive, the Congress, and the Supreme Court, for terms of six years.[49] That the Tribunal shall be renewed by thirds every two years, with an option for re-election, implied that there should be a plural composition so that the institute would not be subject to political alternatives.[50] Should it be the case, the requirement of a supermajority vote for the Tribunal to rule should not be a surprise. The Congress in 1982 passed a law on the functioning of the Tribunal, in which a consent of at least six judges was necessary for constitutional review.

The supermajority rule of Chile came much later than other cases. Since the end of the presidency of General Pinochet in 1990, the Constitutional Tribunal of Chile had been witnessing a transition of the country from an authoritarian regime to a more democratic one, though the Tribunal was not deemed to play an active role yet. According to one account, the relatively passive attitude was due to that part of its members were loyal to the regime, and a legal culture that was hostile to judicial interference in legislations, and a political reality that the Senate and the lower house were dominating by different blocs and therefore already counterbalancing with each other.[51] No matter whether it is correct or not, one thing could be certain is that at that time the Tribunal was not explicitly entitled to repeal a statute which it found unconstitutional. What it was allowed, according to the Constitution, was to review the laws prior to their promulgation and resolve the questions of constitutionality.[52] Not until 2005, when the government introduced a series of amendments to the Constitution to further

[44] Antonio Picado, *Explicación de las Reformas al Código de Procedimientos Civiles* (San José: Imprenta Nacional, 1937), 418–19, cited in Robert S. Barker, 2000.
[45] Article 10, "The Supreme Court of Justice, by vote of no less than two-thirds of all its members, has the power to declare the unconstitutionality of dispositions of the Legislative Power and decrees of the Executive Power."
[46] Constitution of Peru 1964, Title 2.
[47] Eduardo Dargent, "Determinants of Judicial Independence: Lessons from Three 'Cases' of Constitutional Courts in Peru (1982–2007)", *Journal of Latin American Studies*, 41 (2009), 251–278.
[48] Constitution of Peru 1979, Article 298.
[49] Article 297.
[50] Eduardo Dargent (2009).
[51] Javier Couso, "Models of Democracy and Models of Constitutionalism: The Case of Chile's Constitutional Court, 1970-2010", T*exas Law Review*, 89 (2011), 1517-1536.
[52] Constitution of Chile as in 2003, Article 82

the democratic transition, the power of the Constitutional Tribunal was expanded significantly with *a posteriori* control of the constitutionality of legislations. The amendments clearly distinguished writ for unconstitutionality from writ of inapplicability for unconstitutionality, with separate procedures stipulated in the Constitution that a majority of four-fifths could annul statutes.[53] The supermajority requirement is said to be a mechanism ensuring that only in cases of clear violations of the Constitution statutes could be repealed.[54] For *a priori* review and *inter partes* adjudication, the majority voting rule remained unchanged.

3.3.2 Mexico: A Century-Long Tradition

At a first sight, Mexico is a case similar to the foregoing three Ibero-American countries, yet there are some particularities that should be discussed separately in a new section.

Prior to 1994, judicial review in Mexico was consolidated around the amparo suit, a limited form of individual rights protection that the Supreme Court's rulings only applied to the affected plaintiff, and were not of *erga omnes* effect that could lead to annulling the laws in question.[55] In 1994, the newly elected president Ernesto Zedillo assumed his office with a plea to constitutional reform to strengthen the judiciary. Just one week after his inauguration, Zedillo proposed in a speech to the nation a reform to broaden powers of the Supreme Court to include decisions on the constitutionality of laws for actions, because redress were not enough to resolve the constitutionality conflicts.[56] A prominent feature of this reform was that it gave the Supreme Court power to hand down rulings on constitutional petitions with *erga omnes* effect, and to invalidate unconstitutional legislations. In the original bill prepared by the president, a decision to achieve *erga omnes* effect had to be made by a supermajority of at least nine judges out of eleven, but Senate reduced it to eight in order to make the new mechanism "viable".[57] In the end, the amended Constitution stipulated that the rulings of the Supreme Court to invalidate unconstitutional provisions by at least eight votes shall have general effects.[58] In spite of the high threshold, the reform of judicial power is regarded as "a historic break from the government's traditional mistrust of the judiciary".[59]

Intriguingly, the reason behind the qualified majority rule was always being assumed rather than explained, and even the president who drafted the law did not give any argument to justify the need for a nine out of eleven supermajority.[60] Although a restrained Court could serve the interest of the president and the long-time ruling party PRI,[61] when we dig into the legal system in Mexico, it would be not hard to notice a tradition, or a genealogy, of supermajority rules.

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[53] Constitution of Chile as in 2005, Article 93, "To resolve, by the majority of four-fifths of its members in office, on the unconstitutionality of a legal precept declared inapplicable in conformity with that provided in the previous Numeral."
[54] Dante Figueroa, "Constitutional Review in Chile Revisited: A Revolution in the Making", *Duquesne Law Review,* 51 (2013), 387–419.
[55] Pilar Domingo, "Judicial Independence: The Politics of the Supreme Court in Mexico", *Journal of Latin American Studies*, 32 (2000), 705-735.
[56] "President Announces Reform of Justice System to 'Invigorate Our Democracy'", *BBC*, 8 December 1994.
[57] Alfredo Narváez Medécigo, "Enforcement Of Fundamental Rights by Lower Courts: Towards A Coherent System Of Constitutional Review In Mexico", *Mexican Law Review*, 6 (2013), 3-44, note 123.
[58] Article 105.
[59] Robert Kossick, "The Rule of Law and Development in Mexico", *Arizona Journal of International and Comparative Law*, 21 (2004), 715–834.
[60] Alfredo Narváez Medécigo, 2013, note 123.
[61] Pilar Domingo (2000).

In Mexico, as in many civil law systems, courts would not adhere to *stare decisis,*[62] but this Central American country has been having its unique form of doctrine of precedent, *jurisprudencia*, since not later than 1908, when the Civil Procedure Code allowed the Supreme Court to form binding decisions by a majority of at least nine votes.[63]

Apparently, supermajority rule has long been a procedure for the 11-member Supreme Court to set precedents binding to all lower courts by consistently making decisions on amparo cases interpreting the Constitution. This practice has continued through the 20th Century along with changes of size of the Supreme Court. For instance, in the 1968 judicial reform when the scope of *jurisprudencia* included all cases, no longer limited to amparo, the voting threshold for the then 21-member Supreme Court in plenary session was 14, in other words a two-thirds supermajority.[64]

Having said that, there seems some truth to suggest that supermajority rules in judicial review in Mexico may be a heritage in some sense and could be traced back much earlier than the 1994 judicial reform. No wonder the rule is said to be a balance between the old tradition of having *inter partes* effects and the necessity to issue general declarations of unconstitutionality.[65]

3.3.3 South Korea: A Distrust of the Court

The apex court in South Korea is yet another example that was not being trusted when it was empowered. After the World War II, the Korean people, who had been colonised by Japan since 1910, was liberated and governed by the United States Army Military Government in Korea for three years. In the meantime, the development of a decolonised new regime was in progress.

One main issue for the constitutional framers was whether Korea should adopt the American, diffuse model of judicial review, or the centralised model as in West Germany and France. In the first draft, the American style was chosen, but due to the widespread distrust of judges who had been "subservient to the authorities under Japanese colonial policy" and were deemed to be inexperienced in public law, the centralised model was opted for in the end.[66] The Constitution adopted by the Constitutional National Assembly in 1948 stated the establishment of the Constitutional Committee to adjudicate in constitutional matters, composing of the vice president as chair, five judges of the Supreme Court and five members of the parliament. Its organisation and procedures shall be further prescribed by law, while a decision-making rule had been specified in the Constitution, namely the decision on the unconstitutionality of statutes had to be concurred by at least two-thirds of its members.[67] This provision was said to illustrate a presumption of constitutionality and reflect the

[62] Julio Rios-Figueroa and Matthew M. Taylor, "Institutional Determinants of the Judicialisation of Policy in Brazil and Mexico", *Journal of Latin American Studies*, 38 (2006), 739–766.
[63] Federal Civil Procedure Code 1908, Article 786, "Supreme Court of Justice decisions passed by a majority vote of nine or more of its members, form a binding decision if what was decided is reiterated in five consecutive decisions unbroken by any decision to the contrary."
[64] Hector Fix Zamudio, "A Brief Introduction to the Mexican Writ of Amparo", *California Western International Law Journal*, 9 (1979), 306–348.
[65] José Maria Serna de la Garza, "Supreme Court of Mexico", Max Planck Encyclopedia of Comparative Constitutional Law (Oxford University Press, 2016).
[66] Dae-Kyu Yoon, "Judicial Review in the Korean Political Context", *Korean Journal of Comparative Law*, 17 (1989), 133–178.
[67] Constitution of the Republic of Korea 1948, Article 81.

public distrust of the judiciary, and therefore "it was better to defer to the popularly elected legislature".[68]

Maybe. Although the Constitution was mainly drafted by 10 legal experts under the leadership of Chin-O Yu, Syngman Rhee, the then speaker of the National Assembly, was hugely influential. The framers originally preferred a parliamentary system to a presidential system, yet Rhee, who was practically the sole presidential candidate at that time, insisted on a presidential system and threatened to launch a nation-wide opposing movement if there was no revision on the Constitution. The drafting committee subsequently compromised.[69] That being said, it is plausible that the supermajority rule imposed on the Constitutional Committee as laid down in the Constitution was a deliberate choice of Rhee that could serve his interest once he was the country's leader.

3.3.4 El Salvador, Afghanistan, and Morocco: New Constitutional Orders

Another type of courts that were not being trusted were more or less born amid political and constitutional changes. In the new order of constitutionalism, apex courts were delegated the power to review policies and governments' acts. Supermajority rules being adopted in judicial review may reflect a certain extent of mistrust.

After three years of junta government, El Salvador in 1982 commenced a Constitutional Assembly consisting of multi-parties to draft a new constitution, which was finalised in 1983. The new Constitution, for the first time, established a five-member Constitutional Chamber in the Supreme Court delegated with the power of constitutional review of all laws, a power that the Supreme Court did not have in the past.[70] In June 1984, days after the new president assuming office, the same Assembly, at the initiative of the Supreme Court, passed the Judicial Organic Law spelling out regulations on the judiciary. Unanimous votes shall be needed to annulled unconstitutional laws and decrees, while supermajority votes of at least four out of five were necessary for adjudicating in cases of amparo and habeas corpus. It seems that the Constitutional Chamber was designed to have its say on constitutional petitions only in rare cases.

In Afghanistan, the fall of the Taliban regime, the 2004 Constitution established an independent Supreme Court with competent to review the conformity of laws and decrees. The challenges that the Court would face with have long been pointed out, and one of them was that the Court had to reconcile Islamic law and constitutionalism,[71] and another one was that there was no buffer between the Supreme Court and political interests which deemed to be precarious in the Afghan post-conflict context.[72] In addition to that according to the Constitution the Court could only adjudicate on the

[68] Gavin Healy, "Judicial Activism in the New Constitutional Court of Korea", *Columbia Journal of Asian Law*, 14 (2000), 213–234.
[69] Chi Young Pak, "The Third Republic Constitution of Korea: An Analysis", *The Western Political Quarterly*, 21 (1968), 110-122.
[70] "Report on the Situation in El Salvador", The US Department of State, 16 January 1984.
[71] Said Amir Arjomand, "Constitutional Developments in Afghanistan: A Comparative and Historical Perspective", 53 Drake Law Review, 53 (2005), 943–962.
[72] Maren Christensen, "Judicial Reform in Afghanistan: Towards a Holistic Understanding of Legitimacy in Post-Conflict Societies", *Berkeley Journal of Middle Eastern & Islamic Law*, 4 (2011), 101–157.

request of the government or lower courts,[73] and that all nine members were appointed by the president with the endorsement of the lower house,[74] the 2005 Law on the judiciary required a two-thirds supermajority of the Supreme Court to rule.[75]

Morocco is another Islam country where there is a supermajority rule in judicial review, yet the hard-to-reconcile dilemma for its Constitutional Court was constitutionalism and monarchy. In 2011, the King of Morocco introduced a new constitution to ease the public discontent triggered by the Arab Spring, vowing to respect citizens' rights. The new Constitutional Court was hence established, of which half the members shall be appointed by the King, and another half by the Parliament, which was being regarded as a sign of genuine checks and balances.[76] Moreover, different from the Constitutional Council installed by the previous King which could only review laws before their promulgation upon the request of the governments or lawmakers,[77] the Court could do *ex post* review and that was said to be a significant empowerment.[78] The Law on the Court specified a supermajority rule for constitutional review[79] could therefore be used by the King to moderate its power in some way.

3.4 Courts in Divided Societies

In the third bunch of cases, supermajority rules in judicial review were adopted in countries that were deeply divided.

Lebanon has long been haunted by Christian-Muslim conflicts, and even had suffered a decade-long civil war. When all sides set to end the war and sign the Taif Agreement in 1989, they agreed to create a constitutional council to observe the constitutionality of the laws and to settle disputes arising from elections. The Council, which went to function after few years of delay, was later designed to be consisted of 10 members, half of them appointed by the government, and half of them by the Parliament. Although there seems no such a rule prescribed by law, there have always been five Christians and five Muslims in the Constitutional Council, reflecting the idea of consociationalism, just as other institutes were also marked by the principle of power-sharing. Seats in the Parliament have been equally divided between Christians and Muslims, and the president, the prime minister, and the speaker of the parliament traditionally have been a Maronite Christian, a Sunni Muslim, and a Shia Muslim respectively. When the Council started operating in 1993, the Law on it stipulated a supermajority of at least seven votes for constitutional review.[80] It seems fair to say that in effect neither the Christian members nor the Muslim members could rule on their own, and neither the five appointed by the government nor the five chose by the Parliament could dominate the institute.

[73] Constitution of Afghanistan 2004, Article 121.
[74] Ibid., Article 117.
[75] Law on the Structure and Competencies of Courts 2005, Article 25.
[76] Shams Al Din Al Hajjaji, "Government by Judiciary in Islam: Islamic Theory of Government and Mal/Practice of Muslim Governments (Turkey, Saudi Arabia, Egypt and Morocco)", *California Western International Law Journal*, 48 (2018), 283–339.
[77] Ann Elizabeth Mayer, "Moroccans—Citizens or Subjects: A People at the Crossroads", *NYU Journal of International Law and Politics*, 26 (1993), 63–105.
[78] Francesco Biagi, "Will Surviving Constitutionalism in Morocco and Jordan Work in the Long Run: A Comparison with Three Past Authoritarian Regimes", *Cambridge Journal of International and Comparative*, 3 (2014), 1240–1259.
[79] Constitutional Law on the Constitutional Court 2014, Article 17.
[80] Law on the Constitutional Council 1993, Article 12.

After the fall of communism in Eastern Europe, the then President of Czechoslovakia Václav Havel faced with a new constitutional crisis: a split of the state. "Our country would cease to exist", he foretold.[81] One of his ways to prevent the country from dismantling was to call for an re-establishment of the Constitutional Court, which had ceased to function for decades in the period of the communist regime. In his views, federalism might keep Czechoslovakia together under common institutions, and the Court could resolve constitutional disputes and break political deadlocks.[82] His idea to create a 12-member constitutional court so that serious disputes could be solved through legal rather than political means was promptly endorsed, and a constitutional act prescribing that the Court shall be composed of six judges from Czech and six from Slovak was passed by the parliament,[83] followed by a law requiring a majority for the Court to adjudicate and a supermajority of nine votes to make decisions deviated from precedents and on matters concerning interpretation of constitutional acts.[84]

Havel failed to hold the two peoples together, and the Court had existed for only 11 months before the two republics having their own constitutional courts in 1993. For the newly established Czech Constitutional Court, a majority vote shall be adopted for rulings, and a supermajority of nine out of 15 to repeal the laws and adjudicate in certain issues as designated in some provisions in the Constitution.[85] It was similar to the previous Court in the way that a higher threshold was needed to rule on important matters.

One remark. In the very beginning, when Czechoslovakia decided to create a constitutional court in 1920 which started to function in 1921, it was composed of seven judges and at least five of them shall be concurring to make decisions instead of a simple majority of at least four.[86] It seems a coincidence that after decades of moribundity, the Court opted for a supermajority rule once again.

3.5 Conclusion

The above survey hopefully has depicted a contour of the adoption of supermajority rules in 13 countries (as noted in Table 1), an account that is "thick" enough (to borrow Hirschl's term)[87] to take the broader political context and nuances into consideration. What could be seen is that supermajority rules in judicial review are sometimes being used as a means to tame the courts, the "junkyard dog" that was bought to serve the interests of its owner but later posed some risk and even would bite.[88] However, the voting rules are different from leashes introduced to dogs, in the way that they may not be effective if the politicians could not secure certain judges that are loyal to or at least align with them, and more fundamentally they are an internal control more than an external one, encouraging self-restraint through an institutional means.

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[81] "Havel Warns of Czechoslovak Collapse, Scorn of World", Reuters, 10 December 1990.
[82] "Czechoslovak Government Backs Havel's Crisis Proposals", Reuters, 13 December 1990.
[83] Constitutional Act 91/1991 on the Constitutional Court of the Czech and Slovak Federal Republic, Article 10.
[84] Law 491/1991 on the Organisation of the Constitutional Court of the Czech and Slovak Federal Republic and on the Proceedings Before It, Article 9.
[85] Law 182/1993 on the Constitutional Court, Article 13.
[86] Tomáš Langášek, *Ústavní soud Československé Republiky a Jeho Osudy v Letech 1920–1948* (Plzeň: Aleš Čenek, 2011), available at: www.usoud.cz/en/constitutional-court-of-the-czechoslovak-republic-and-its-fortunes-in-years-1920-1948.
[87] Ran Hirschl (2004), chapter 2.
[88] Martin Shapiro, "The Success of Judicial Review and Democracy", in Martin Shapiro and Alec Stone Sweet, *On Law, Politics, and Judicialization* (New York: Oxford University Press, 2002).

This may explain why some judges were not offended as one might think. For example, Chi-Tung Lin, a legal expert in Taiwan who was appointed to be a Grand Justices in 1958, seemed acquiescent to the regulations, writing that "Grand Justices Council Adjudication Act…provides detailed rules to follow, and by and large is a good legislation" in 1959.[89] In Russia, judges such as Vitruk agreed to the judicial reform. In Nicaragua, a supermajority rule was even initiated by the Supreme Court members who tried to prevent the institute from being diluted by the government. Having said that, supermajority rules could also be seen at least as a compromise of the courts, or even as a means of the judicial elites to negotiate with politicians, avoiding blatant interference. This judicial point of view is what could not be overlooked when we try to provide a political account of developments of constitutional courts.

Table 1: Adoption of Supermajority Rules

	Thresholds	Adopted Years	Applied in	Prescribed in
Afghanistan	Two-Thirds	2005	All Jurisdictions	Legislation
Costa Rica	Two-Thirds	1938	Annulling Statutes	Legislation
Chile	Four-Fifths	2005	Annulling Statues *a posteriori*	Constitution
Czech	Nine Out of Twelve	1993	Annulling Statutes	Legislation
El Salvador	Unanimity	1984	Annulling Statutes	Legislation
Lebanon	Seven Out of Ten	1993	All Jurisdictions	Legislation
Mexico	Eight Out of Eleven	1994	Annulling Statutes	Constitution
Morocco	Two-Thirds	2014	All Jurisdictions	Legislation
Nicaragua	Six Out of Nine	1990	All Jurisdictions	Internal Rule
Peru	Six Out of Nine	1979	Annulling Statutes	Legislation
Russia	Two-Thirds	1994	Constitutional Interpretation and Annulling Statutes	Legislation
South Korea	Two-Thirds	1948	All Jurisdictions	Constitution
Taiwan	Three-Fourths	1958	Constitutional Interpretation and Annulling Statutes	Legislation

Furthermore, this diachronically comparative study shows that the majority of cases were not about political retaliation, but an incremental empowerment of judicial power. In some cases, the supermajority rules may imply a timidity of politicians facing with radical changes in political order

[89] Chi-Tung Lin, "An Issue of the Application of the Grand Justices Council Adjudication Act", *The Law Monthly*, 10 (1959), 31-33.

and constitutionalism that was consolidating. In other cases, particularly in those Ibero-American countries where judicial power was usually limited to *inter partes* legal remedies as what could be seen in amparo, introducing supermajority rules was a way to differentiate the broader power that could strike down laws and be of *erga omnes* effect from the original and "ordinary" power. Go back to the junkyard dog. These countries were not imposing external control on the dogs after being bitten. Rather, they were clear about what kinds of skills they would like their dogs to acquire and did so with caution. It could be strange to assume that every households should buy the same kind of dogs with the same kind of functions regardless how they were doing in the past. Whether supermajority rules were strengthening or weakening judicial power could only be told by diachronic reviews.

Last but not least, although it may not be the causes of the adoption, supermajority rules in theory could be possible to play a specific role in deeply divided societies where consociationalism is opted for, just as in Lebanon both the other two branches are equally shared by Christians and Muslims.

Chapter 4: Development of Supermajority Rules in Judicial Review

4.1 An Overview

In this part, how courts with supermajority voting rules have been performing would be reviewed. As what Chapter 2 says, this research does not opt for quantitative approaches, for judicial power is influenced by too many variables and statistical methods are not well suited to test whether every aspect of a case is consistent with a hypothesised causal process,[90] not to mention the methodological hardship to collect relevant data from courts which were of low transparency. Instead, particular cases are chosen to reflect how courts have been doing in constitutional review.

There are cases like Taiwan and, to a lesser degree, Peru that supermajority rules are sometimes regarded as an obstacle to adjudication, but somewhat strikingly, in most cases the high thresholds are rarely mentioned. On the contrary, some courts are well-known for their bold decisions to rule against the governments in some significant cases.

4.2 Judicial Power Limited

4.2.1 Peru: The Loyal Minority

Peru is one of the few cases that their supermajority rules have been discussed. Since 1982, the Tribunal of Constitutional Guarantees needed six out of nine votes to declare a law unconstitutional, in other words, a two-thirds rule. This number was deemed to be excessive, leading to a result that most of the rulings "consisted of a collection of individual opinions with no legally binding power, as they failed to reach the six votes requirement."[91] After the 1995 election, the re-elected President Alberto Fujimori with a majority in the Congress even further heightened the threshold to six out of seven.

What the Peruvian Court suffered from made it the perfect case to embody the detrimental effects of supermajority rules. First, a strict threshold alone would not necessarily make things worse, but a supermajority rule with a controlled appointment system would. So long as the government could secure enough seats in the Congress, which would appoint four compliant judges, or even only two loyalists after the 1996 reform, it could "gridlock the court"[92]. And this was exactly what did happen. In 1995, the government suggested candidates who had strong ties to it and were thus unacceptable to the opposition, who could veto the appointment by holding more than one-third of seats. After delaying for a year and a half, the government and the opposition compromised on a list of appointees, and two of them were considered to be align with the government.[93] In late 1996 and early 1997, the Court was asked to review the constitutionality of a law allowing for a second re-election of President Fujimori. Although five judges found it problematic, José García Marcelo, an attorney supported Fujimori's auto-coup of 1992, and Francisco Acosta Sánchez, who had represented Fujimori's

[90] Alexander L. George and Andrew Bennett, *Case Studies and Theory Development in the Social Sciences* (Cambridge, Massachusetts: MIT Press, 2005), chapter 2.
[91] Eduardo Dargent (2009).
[92] Ibid.
[93] Jodi S. Finkel, *Judicial Reform as Political Insurance: Argentina, Peru, and Mexico in the 1990s* (Notre Dame, Indiana: University of Notre Dame Press, 2008), p. 78.

government in the state-owned airline,[94] successfully barred the Court from declaring the law unconstitutional.[95]

Another shortcoming of the Peruvian voting rule was that it was not a ratio but a fixed number, and therefore may render difficulties in some situations. In 1993, a Court member detailed how difficult it was to make decisions even under the requirement of six out of nine votes as follows:

> "We faced uncomfortable situations when we were unable to attain six votes in constitutional demands or five in Amparo writs, when we were eight magistrates. (During this time a magistrate had retired due to illness.) The Tribunal was a little politicised. To attain eight votes was almost impossible, save in those cases that the issue in play was to benefit the government."[96]

It is worthy to note that after the loss of Fujimori in the 2001 election, given the weak governing coalition and competing political parties, the Congress agreed to lower the voting threshold to five, though that was not the simple majority the Court asked for. Cases concerning unconstitutionality filed in the Court have been more than before, from around 10 to 33 per year in average,[97] but whether judges are assertive to rule against the government, as shown by a statistical research, has to some extent depended on which political actor enacted the law and whether that actor was still in power.[98] Consequently, the Peruvian case could tell us how detrimental a supermajority rule could be under particular circumstances, rather than its effect on judicial power in general cases.

4.2.2 Taiwan: Sharp Drop in the Number of Rulings

The second case that could illustrate how judicial power was limited by a stringent voting rule is the Council of Grand Justices in Taiwan. The supermajority rules adopted since 1958 are deemed to be the cause of the ineffectiveness of the Council. As Hsu Tzong-li, the President of the Judicial Yuan since 2016, puts it, "a critical factor resulting in low effectiveness is the two-thirds majority rule".[99] Yueh-Sheng Weng, a former president of the Court and a long-serving justice from 1972 to 2007, also contends that the 1958 Adjudication Act "severely obstruct the Grand Justices to exercise their authority, making the constitutional interpretation of the Grand Justices paralysed".[100] An indicator both judges use is the number of rulings the Council made diachronically, which strikingly dropped in 1958 when the supermajority rule came into effect, and was at peak in 1994, one year after the introduction of Constitutional Interpretation Procedure Act, according to which the requirement of constitutional review was lowered to a two-thirds majority of those attending Justices. (As noted in Figure 2)

Figure 2: Number of Rulings of the Council of Grand Justices 1949–2018*

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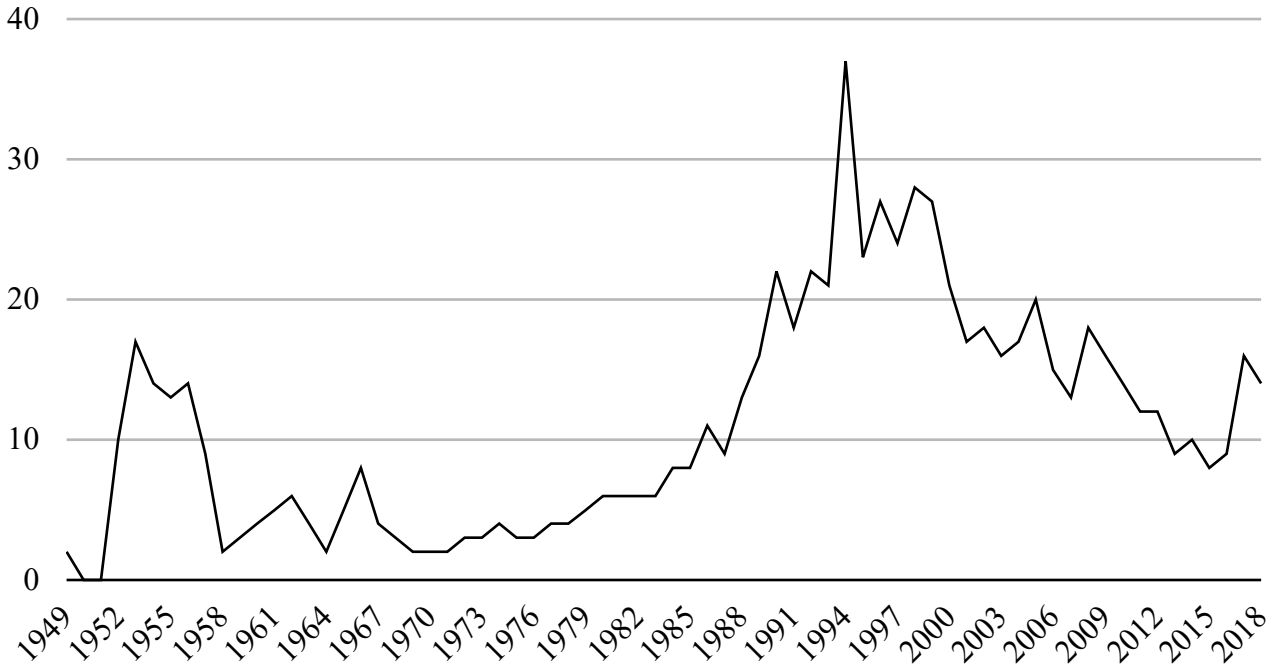
[94] Lydia Brashear Tiede and Aldo Fernando Ponce, "Ruling Against the Executive in Amparo Cases: Evidence from the Peruvian Constitutional Tribunal", *Journal of Politics in Latin America*, 3 (2011), 107–140, Appendix 1, Table B.1.
[95] *Constitutional Court v. Peru*, Inter-American Court of Human Rights (Series C) No. 55, 2001.
[96] Congreso Constituyente Democrático, Comisión Permanente de Constitución y Reglamento. 38th session, 4 November 1993, cited in Eduardo Dargent (2009).
[97] Peruvian Constitutional Tribunal, cited in Eduardo Dargent (2009).
[98] Lydia Brashear Tiede and Aldo Fernando Ponce, "Evaluating Theories of Decision-making on the Peruvian Constitutional Tribunal", Journal of Politics in Latin America, 6 (2014), 139–164.
[99] Minute of National Conference on Judicial Reform, 20 March 2017, available at: justice.sayit.mysociety.org/speech/708697.
[100] Yueh-Sheng Weng, (2007).

* Complied by the author with data collected from the Council, available at: cons.judicial.gov.tw/jcc/zh-tw/jep03.

How did the rule hinder adjudication? First, the Council of Grand Justices was and is similar to the *ex ante* model of decision-making, in which a member would be assigned to draft a preliminary ruling and report the case in the plenary session. For the interpretation shall be a collective work contributed and signed by all of the attending Justices, even including those who voted in the minority, they would deliberative closely and scrutinise every phrases to ensure the final judgment



could not be contrary to their own views.[101] Second, when the majority was short of three-fourths, say, 11 votes out of 15, the Council was not allowed to hand down any rulings, be it a decision in favour of the constitutionality or not. This was different from many courts where judges shall uphold the laws being reviewed when the concurring votes do not meet the supermajority requirement. In other words, there was no presumption of constitutionality in Taiwan. For there was no time limit for the Grand Justices to make decisions as long as there is no oral argument, which is very rare, cases in which there was lack of consensus would be pending, and pending.

For example, the Council was asked by the Control Yuan, a hybrid between a government performance auditor and a political ombudsman, in 1953 to decide on the institutional hierarchy of courts, namely whether courts should be part of the Executive Yuan or the Judicial Yuan. However, seven years later the Council still could not make a decision, irritating Control Yuan members who threatened to take the procrastination into account when they were considering the appointment of Grand Justices next time.[102] Not until four months after the threat, the Council could hand down the Interpretation No. 49 to place courts under the control fo the Judicial Yuan. For the immunity of elected representatives controversy, the Council was blamed for being fruitless after 16 meetings of

[101] Yueh-Sheng Weng, "The Participative Experience of the Constitutional Interpretation of the Justice of the Constitutional Court", National Chung Cheng University Law Journal, 24 (2008), 377–393.
[102] "Members of Control Yuan Are Angry for the Restructure of Courts Still Being Pending", *United Daily News*,15 April 1960, p. 2.

review panel and two plenary meetings, in which there was no opinion that could get support from at least three-fourths of votes.[103]

However, the low efficiency theory faces with two problems. First, whether a high threshold was deterring the Council to make decisions, or pressuring the Grand Justices to take time patiently to compromise with each other in order to make decisions cautiously, it is open to interpretation. Second, and more importantly, this theory could hardly explain why since late 1980s there has been an increase in the number of rulings, given that the voting rule remained unchanged until 1993.

First and foremost, Taiwan witnessed a radical political change in the second half of 1980s, with the emergence of Democratic Progressive Party in 1986 and abolishment of the Martial Law Decree and Temporary Provisions in 1987. The Judicial Yuan and especially the Council of Grand Justices were deemed an impartial arbitrator to intervene in political disputes, and this tendency of judicialisation is said to be more evident when there were political gridlocks.[104] This seems similar to the Peruvian Court since 2000.

Moreover, the high threshold was not the only shortcoming of the Adjudication Act 1958. The low efficiency was also attributed to the limitations on individuals' petitions and the silence of the Constitution and the law on the effectiveness and retrospective power of interpretations of the Council from time to time.[105] In 1979, the Control Yuan suggested amendments to the Adjudication Act to lower the voting threshold and strengthen the legal bindingness of constitutional interpretations,[106] before the Legislative Yuan rejected a two-thirds rule as members supporting reforms were minority.[107] Nevertheless, the Council seemed not content with the straitjacket it had been wearing for years, and in 1982 made the Interpretation No. 175 to assert that the Judicial Yuan was entitled to propose how the regulations of the judiciary should be, which subsequently drafted an amendment bill that was widely praised. The Legislative Yuan was unmoved and did not proceed the motion, but the Council did it in its own way. By handing down the Interpretations No. 185 and No. 188 in 1984, "interpretations rendered by the Judicial Yuan shall have a binding effect on all agencies and people", and shall "come into force on the same day when the interpretation is publicly announced" unless otherwise specified in the interpretation. Since then, constitution interpretations could only be repealed through either a constitutional amendment or re-interpretation by the Council itself.[108] As expected, individuals' petitions rose sharply afterwards, the Council also made more rulings after consolidating its judicial power.

It is, then, fair to conclude that although the Council was undeniably made inefficient by the supermajority rule, it by making judicial decisions under constraints enlarged the boundary of judicial power and helped transform the Council from an advisory institute into a powerful adjudicator. And this started happening even in the first half of 1980s, as it is once observed, the compliant Council "quietly stepped into the territory of constitutional review…when Taiwan was still under the martial-

[103] "Control Yuan Urged Council of Grand Justices to Elaborate on Application of Flagrante Delicto Law", *United Daily News*, 10 February 1961, p. 2.
[104] Chien-Chih Lin, "The Birth and Rebirth of the Judicial Review in Taiwan—Its Establishment, Empowerment, and Evolvement, National Taiwan University Law Review", 7 (2012), 167–221.
[105] "Council of Grand Justices Has to be Strengthened", *China Times*, 22 September 1976, p. 2.
[106] "Control Yuan Suggested Amendments to Grand Justices Adjudication Act", *China Times*, 23 December 1979, p. 3.
[107] "Threshold for Council of Grand Justices to Interpret Constitution Remains Unchanged", *China Times*, 6 April 1980, p. 2.
[108] Dennis T. C. Tang, "Judicial Review and the Transition of Authoritarianism in Taiwan", in Taiwan Studies Promotion Committee of Academia Sinica, ed., *Change of an Authoritarian Regime: Taiwan in the Post-Martial Law Era* (Taipei: Academia Sinica, 2001), p. 447.

law rule."[109] After the end of the Martial Law in 1987, the landmark Interpretation No. 261 which *de facto* initiated a constitutional amendment,[110] and the change in voting rule of the Council from three-fourths to two-thirds in 1993,[111] the Council could no longer be deemed to be weak but a benign force for constitutional democracy, which is able to declare a constitutional amendment null and void as in 1999,[112] and is trusted to adjudicate in social controversies of vital importance such as the same-sex marriage case in 2017.[113]

4.3 Courts With Their Roles

4.3.1 Mexico: A Successful Story

The ever strengthening Council since late 1980 in Taiwan is hardly an outlier. The Mexican Supreme Court is an example that courts with supermajority rules could still play their roles in judicial review.

Since 1994, the Mexican Court has been being able to strike down unconstitutional laws by a supermajority of at least eight votes out of 11. There were no lack of petitions, and for controversial electoral laws, the Court even ruled provisions unconstitutional for the first time in 1998. Yet at the same time, there have always been concerns that the supermajority rule may lead to an odd situation that if the Court could only declare laws unconstitutional by simple majority votes, the laws would remain in effect, and the authority and legitimacy of the Court would therefore be undermined.[114] Generally speaking, that was not what happened.

Of the original 11 justices after the judicial reform, four were chosen with the exclusive support of the ruling party PRI, but most of them were career judges who deemed to be capable,[115] and the newly increased tenure of 15 years is said to be long enough for the judges to rule independent from their appointers.[116] After the fall of PRI in 2000, all judges appointed to the Court have been the product of consensus among the major political parties, implying that there is no hard-line minority who would incline to block decision-making rather than compromise, and the Court became effective once elected branches have polarised preferences and are even in fragmentation sometimes.[117] In particular, four aspects are now to be discussed.

First, to some degree similar to the Council of Grand Justices in Taiwan, the Mexican Court seizes the opportunity when there is space untouched by regulations. In 2009, the Inter-American Court of Human Rights required the Mexican State to compensate the victims of forced disappearance, the

[109] Tzu-Yi Lin, Ming-Sung Kuo and Hui-Wen Chen, "Seventy Years On: The Taiwan Constitutional Court and Judicial Activism in a Changing Constitutional Landscape", *Hong Kong Law Journal*, 48 (2018), 995–1027.
[110] David S. Law and Hsiang-Yang Hsieh, "Judicial Review of Constitutional Amendments: Taiwan", in David S. Law, ed., *Constitutionalism in Context* (Cambridge University Press, forthcoming).
[111] Constitutional Interpretation Procedure Act, Article 14.
[112] Interpretation No. 499.
[113] Interpretation No. 748.
[114] Jodi Finkel, "Supreme Court Decisions on Electoral Rules after Mexico's 1994 Judicial Reform: An Empowered Court", *Journal of Latin American Studies*, 35 (2003), 777–799.
[115] José Antonio Caballero Juárez, "The Supreme Court of Mexico: Reconfiguring Federalism through Constitutional Adjudication and Amendment after Single-Party Rule", in Nicholas Aroney and John Kincaid, ed., *Courts in Federal Countries: Federalists or Unitarists?* (Toronto: University of Toronto Press, 2017), p. 273.
[116] Julio Rios-Figueroa and Matthew M. Taylor (2006).
[117] Arianna Sánchez, Beatriz Magaloni, and Eric Magar, "Legalist versus Interpretativist: The Supreme Court and the Democratic Transition in Mexico", in Gretchen Helmke and Julio Ríos-Figueroa, ed., *Courts in Latin America*, (New York: Cambridge University Press, 2011). *See also* Julio Ríos-Figueroa, "Fragmentation of Power and the Emergence of an Effective Judiciary in Mexico, 1994–2002", *Latin American Politics and Society*, 49 (2007), 31–57.

Supreme Court then took the initiative to determine what obligations the judiciary should bear, in some sense bypassing the government. The Court decided by a majority of eight votes that they have to carry out the human rights protection in a manner align with the jurisprudence of the Inter-American Court. What is more, the Court ruled by a majority of seven judges that all courts in Mexico are entitled to make a conventionality review of domestic law based on the standard of the American Convention on Human Rights, and therefore recognised the diffuse model of judicial review in particular issues. Although a supermajority of eight is needed for constitutional review, this instance shows that the Court lacking of eight votes could still make important decisions to enlarge power of the judiciary as a whole.[118]

Second, judges would compromise with each other when they would like to make assertive decisions on crucial cases. In 2001, President Vicente Fox proposed an energy bill which may pave the way for the selling of energy by private investors. This policy was opposed by opposition parties in the Congress, who presented a constitutional petition to the Supreme Court. In this "politically and economically sensitive" case, four judges found the policy constitutional and therefore the remaining seven could not annul the legislation under the supermajority rule. However, one of the four judges Olga Sánchez Cordero, who was labeled as centrist,[119] was persuaded by the majority that taking the possible privatisation of a strategic sector of the country, she reversed her stance and joined the seven judges to effectively strike down the energy bill,[120] particularly adding her reasoning in the judgement to argue that the policy shall fall within the scope of legal limitations.[121] Even the ruling would be a blow to the President, the Court shew its ambition to gather enough votes to make a legally binding decision.

One more way to illustrate how the Court has been forming consensus is abortion cases. In 2000, the Court was asked to review the constitutionality of the new abortion law in Mexico City, namely Robles Law, to allow abortion in five exceptions, such as rape, imprudence, and causing threat to the woman's health. It upheld the law by seven votes, while the minority insisted in the right to life of the foetus.[122] The Court subsequently passed two *jurisprudencias* by 10 votes and by unanimity to establish the doctrine that the right to life shall be protected by the Constitution. Eight years later, the Court with few judges replaced had to decide on another and more important case concerning decriminalisation of abortion in the first trimester. The Court sensibly framed the issue to be the proper obligations of the State to criminalise a particular type of conduct affecting constitutional rights,[123] trying not to touch on the right to life directly. In this way, the majority successfully got the support form Luna Ramos who was deemed a swing vote[124] and agreed that the government shall have the power to determine what penal sanctions should be. In the end, the Court ruled by eight votes to find the decriminalisation law in review constitutional.[125] This controversial case with seven

[118] Alfredo Narváez Medécigo, "Enforcement of Fundamental Rights by Lower Courts: Towards a Coherent System of Constitutional Review in Mexico", *Mexican Law Review*, 6 (2013), 3–44. *See also* Karina Ansolabehere, "One Norm, Two Models. Legal Enforcement of Human Rights in Mexico and the United States", *Mexican Law Review*, 8 (2016), 93–129.
[119] Thea Johnson, "Guaranteed Access to Safe and Legal Abortions: The True Revolution of Mexico City's Legal Reforms regarding Abortion", *Columbia Human Rights Law Review*, 44 (2013), 437–476.
[120] Arianna Sánchez, Beatriz Magaloni, and Eric Magar (2011).
[121] Controversia Constitucional 22/2001.
[122] Acción de Inconstitucionalidad 10/2000.
[123] Alejandro Madrazo and Estefania Vela, "The Mexican Supreme Court's (Sexual) Revolution", *Texas Law Review*, 89 (2011), 1863–1893.
[124] Thea Johnson (2013).
[125] Acción de Inconstitucionalidad 146/2007 y su Acumulada 147/2007.

concurring opinions reflects that a demanding voting requirement could sometimes pressure the judges to take a moderate stance in other to hand down binding rulings.

Lastly, according to the Amparo Law, five consecutive judgments with a majority vote of at least eight judges could become *jurisprudencia* in a drafting process that the Court would discuss how to formulate the thesis. Quantitatively, there has been a sharp increase in the number of *jurispredencia* theses formulated since the 1994 judicial reform, and many of them are protecting fundamental rights such as freedom of speech, freedom of association, and indigenous rights.[126] Although this does not imply that the Court is adequately guaranteeing human rights of Mexicans, it could be hard to say that the supermajority rule alone did or could paralyse the Court in any sense. Rather, it is plausible that the Court which has been adopting supermajority rules for specific jurisdictions for years might have adapted to the limitations and therefore is able to hand down rulings effectively, if not function efficiently.

4.3.2 South Korea: Incremental Changes

South Korea would be said to be another successful case, which democratised after 1987, and the Constitutional Court therefore witnessed the country transitioning from authoritarian rule to democracy and transformed itself into a major institution in the consolidation of Korean newly born and fragile democracy. Although the Court needs a two-thirds supermajority of six votes to declare laws unconstitutional, a recent study shows that there are less than 10 cases per year that were decided by five to four,[127] in other words one vote short of what effective and legally binding rulings require. Given that the Court makes more than 200 decisions in constitutional review *en banc* every year, by numbers it seems that the threshold does not matter so much to its capability. (As noted in Figure 3)

Figure 3: Constitutional Review of the Korean Constitutional Court 2007–2016

	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Decided by Full Bench*	109	148	178	236	236	214	218	164	286	280
Five to Four Cases^	0	4	4	4	1	2	6	2	3	9

* Excluding cases of rejection, dismissal, withdrawal, and other, available at english.ccourt.go.kr/cckhome/eng/decisions/caseLoadStatic/caseLoadStatic.do.

^ Compiled by Joon Seok Hong (forthcoming).

Even when the Court could not gather enough votes to strike down problematic legislations, it does not mean that the Court could never do it. On the contrary, the cases of adultery are always cited as a good example to depict the gradual change of the Court. First in 1990, 1993 and 2001, the Court

[126] Karina Ansolabehere, "More Power, More Rights? The Supreme Court and Society in Mexico", in Javier Couso, Alexandra Huneeus, and Rachel Sieder, ed., *Cultures of Legality: Judicialization and Political Activism in Latin America* (New York: Cambridge University Press, 2010).

[127] Joon Seok Hong, "Signaling the Turn: The Supermajority Requirement and Judicial Power on the Constitutional Court of Korea", *The American Journal of Comparative Law*, forthcoming.

held that the adultery law was not unconstitutional three times, and in 2008 a majority of five judges found the law not in conformity with the Constitution, one more vote was needed to strike down the law, which therefore stood. Yet in 2015, an adultery case was filed in the Court once again, and this time a majority of seven judges voted to invalidate the law. This long process of annulment is seen to reflect that the Court could from time to time align itself with social changes, and therefore what the supermajority rule does is to slow down the pace of changes that the Court could bring, rather than merely preserve the legal and social status quo.[128]

Another example is abortion adjudication. In 2012, the Court was asked to review a criminal law of abortion. Although four judges willing to strike down the law argued that the provision "infringes on the pregnant women's rights to self-determination " and hence "violates the Constitution", the law was eventually upheld by a four to four decision.[129] Years passed, and in 2019 the Court faced with an abortion case again. This time most of the judges in the Court were appointed by President Moon Jae-in and deemed to liberal, and a majority of seven votes found the law infringing women's rights and unconstitutional, and they stroke down the law notwithstanding two judges insisted to protect the life of the foetus.[130] No doubt a liberal court is always a product of a liberal government who appoints the judges, and a liberal government is more or less a reflection of a liberal society, but what the changing attitude on abortion case implies is that how frequent the composition of the Court gets changed may also affect its effectiveness under a demanding voting rule. When there are newcomers, what could not be agreed on in the past might be agreed on now.

4.3.3. Czech: Quasi-Legislator, But…

Among all countries adopting supermajority rules in judicial review, the voting threshold of Czech Constitution Court is the lowest one. According to the Constitutional Court Act, nine concurring judges out of 15 are necessary to repeal unconstitutional statutes and deviate from previous positions of the Court,[131] equivalent to three-fifths. This relatively mild requirement could hardly be an obstacle for the Court to adjudication. Instead, the Court does from time to time annul laws and create gaps that the Court itself or ordinary courts could thus fill. Previous cases show that the Court is capable to make new laws through decisions, and therefore could said to be a quasi-legislator.[132]

In particular, when the Court is about to make a decision that is different from its legal opinions expressed in previous rulings, if it is in panel, it would through a special proceeding submit the issue to the plenum for its consideration to formulate a new opinion replacing the old one.[133] If it is *en banc*, a consent of at least nine judges is needed for the Court to do so. As in May 2019, there are 36 unifying opinions issued by the plenum to establish new legal norms.

[128] Chaihark Hahm, "Constitutional Court of Korea: Guardian of the Constitution or Mouthpiece of the Government?", in Albert H. Y. Chen and Andrew Harding, ed., *Constitutional Courts in Asia: A Comparative Perspective* (New York: Cambridge University Press, 2018), pp. 151–152. *See also* Joon Seok Hong (forthcoming).
[129] 2010 Hun-Ba 402, KCCR.
[130] 2017 Hun-Ba 127, KCCR.
[131] Article 13.
[132] Zdeněk Kühn, "Czech Republic: Czech Constitutional Court as Positive Legislator?", in Allan R. Brewer-Carías, ed., *Constitutional Courts as Positive Legislators: A Comparative Law Study* (New York: Cambridge University Press, 2011).
[133] Constitutional Court Act, Article 23.

However, it must be noted that the Court sometimes deviate from case law without admitting it.[134] This problem is manifested in the controversial health care fees cases. According to the Charter of Fundamental Rights and Freedoms, which is part of the Constitution in a broad sense, Czechs are entitled to the right to health protection.[135] For many years, health care in Czech had been free for charge. However, the government in 2008 launched a public finance reform, including a policy to charge health care fees. The purpose was twofold. On the one hand, the fees would provide income for the government to sustain its health care services. On the other hand, the fees could cut waste and abuse and ultimately provide better health care to people who are in need. Expectedly, the backlash was huge, and many Czechs saw it as a matter of principle and a right enshrined in the Constitution that the government could not touch on.[136]

Being asked to review the constitutionality of the fees introduction, the Constitutional Court was divided. Some judges found the policy a violation to the Charter and deviating from the definition of "payment-free" as established in case law. In their views, "regulatory fees are by nature an entry fee, that a citizen must pay in order to be allowed entry into a health care facility". For some other judges, the fees would be regulatory in nature, just as miscellaneous expenses for payment-free education, therefore its introduction would not violate the established principle.[137] Why does this particular point matters? Because there were eight judges supporting the regulatory fees, and seven opposing. If the understanding of the majority was in line with previous case law, eight votes would be enough to uphold the policy. On the contrary, if it was a new interpretation, as argued by the seven judges, the eight judges were short on one vote to rule. Considering the eight to seven votes situation, the strategy of framing the decision as align with previous legal opinions is hardly surprising at all. On the other hand, that the losing side questioned the validity of the ruling and contended that the credibility of the Court had suffered is also within expectation.[138]

As a judge in the Supreme Administrative Court puts it, the 2008 ruling "has become one of the most controversial cases the Court has ever decided".[139] In 2017, the Court was once again asked to adjudicate in a health care case, concerning the fees for foreigners who are not citizens but currently residing in Czech by working visa.[140] Although the composition of the Court was totally different from that in 2008, except the long-time President Pavel Rychetský who was still serving and consistently voted against health care fees, the Court once again was divided and handed down a ruling by a majority of eight. This time the threshold of nine was not a matter of dispute, for it did not involving deviating from precedents, the case nevertheless shows that in controversial cases whether the Court keeps being divided, the supermajority rule may not function as it is expected, for judges could move the goalposts when necessary.

4.4 Lowering the Voting Thresholds

[134] Vojtěch Šimíček, "Binding Effect of Constitutional Court Judgments on Constitutional Complaints", in Supreme Court Czech Republic, ed., *Binding Effect of Judicial Decisions—National and International Perspectives* (Alphen aan den Rijn: Kluwer Law International, 2018), p. 69.
[135] Article 31.
[136] "Health care fees trouble Eastern Europe", *New York Times*, 26 May 2008.
[137] Pl. ÚS 1/08.
[138] "Czech Constitutional Court Might Discuss Fees Again—Judge", Česká Tisková Kancelář, 29 May 2008.
[139] Zdeněk Kühn, "The Constitutional Court of the Czech Republic", in András Jakab, Arthur Dyevre, and Giulio Itzcovich, ed., *Comparative Constitutional Reasoning* (Cambridge: Cambridge University Press, 2017), p. 216.
[140] Pl. ÚS 2/15.

Of the 13 countries where supermajority rules were used in judicial review, two lowered the thresholds from nearly unanimity to more reasonable requirements, and three other opted for simple or absolute majority in one-step change or incrementally (as noted in Table 3). Peru and Taiwan of these five cases lowered their thresholds after political changes. In particular, the cases of Taiwan, Costa Rica, and El Salvador will now be further discussed.

Table 2: Countries Lowering the Voting Thresholds in Judicial Review

	Supermajority Rules (Adopted Years)		Lower Thresholds (Changed Years)		Total Years in Effect
Afghanistan	Two-Thirds (2005)		Simple Majority (2017)		12
Costa Rica	Two-Thirds (1939)		Absolute Majority (1989)		50
El Salvador	Unanimity (1984)		Four-Fifths (1989)		35+
Peru	Six out of Nine (1979)	Six out of Seven (1996)	Five out of Seven (2001)		40+
Taiwan	Three-Fourths (1958)		Two-Thirds (1993)	Absolute Majority (2022)	64

4.4.1 Taiwan: Being Trusted

Although in 1993, the Legislative Yuan lowered the voting threshold of the Council of Grand Justices to two-thirds, the Council has still been well known or notorious for its supermajority rule. Consequently, when the President Tsai Ing-wen ordered a judicial reform in 2017, the voting rule was included in the agenda and reviewed.

All in all, there were three main arguments for further lowering the threshold to a majority, or it may say that to restore the long lost majority rule. First, the president of the Council in the National Conference reiterated that the supermajority rule has made the Council inefficient, and Grand Justices are even hesitate to have oral arguments, for once they have done it, they must hand down rulings within two months, a time period that they worry is too short for them to form consensus. Second, members in the Conference agreed that the supermajority rule deviates from the norms of foreign countries, making the Council of Taiwan an outlier. Third, just as a member in the Conference put it, “if we trust the expertise of the Grand Justices, their legal expertise…we should leave them more room to work, introducing rules to impose limitations may make them incapable, and I do not have

reason not to trust the Grand Justices."[141] It is therefore fair to conclude that after years of consolidation of constitutional democracy and several influential rulings handed down by the Council, Taiwan people already get along with the authority of the Council.

As a result, the government and the Legislative Yuan both agreed to lower the voting threshold with a new legislation to revamp the Council of Grand Justices, transforming it into the Constitutional Court which would start operating in 2022 with an absolute majority decision-making rule and a two-thirds for quorum.[142]

4.4.2 Costa Rica: Emboldened and Assertive

The circumstance when Costa Rican threw the supermajority rule away was also a complete revamp. After a corruption scandal touched the Supreme Court in 1980s, the Costa Rican government carried out a judicial reform in 1989, establishing a new chamber in the Court, namely Sala IV, and its voting rule was and is an absolute majority, rather than the two-thirds requirement as before.[143]

An often-cited case to show the Chamber's power is the 2003 constitutional amendment case, in which the Court was asked to decide whether the legislative assembly has the power to amend the Constitution in a significant way so that presidential reelection is prohibited.[144] In its decision, the Chamber ruled that only an elected constitutional convention shall be entitled to so amend the Constitution. Although this case was decided by a majority of five, meaning that even under the old voting rule the Court would still be able to make the decision, striking down the amendment and substantially limiting the power of the legislature which is always said to be sovereign makes the Chamber correctly deemed "one of the most powerful courts in Latin America".[145] The change from a weak court to an assertive authority undoubtedly is due to the 1989 reform, in which the high threshold was replaced by a majority rule, emboldening the Court to play a more important role in the country, and to counterweigh the other two branches of government when necessary.

4.4.3 El Salvador: Strike and Counter Strike

The threshold change in El Salvador is yet another type of cases. Two decades after the Salvadoran government lowering the voting rule from unanimity to four-fifths in 1989, the stringent requirement haunted the Constitutional Chamber once again.

In 2010, the parliament planned to bar independent candidates from running for office, and therefore passed a motion to prescribe that only people affiliated to a political party could participate in political elections. However, its move was stroke down by the Constitutional Chamber of the Supreme Court on the same night, ruling that the provisions were unconstitutional.[146] The tension between the court and the parliament was then ever increasing, resulting in a break up one year later,

[141] Minute of National Conference on Judicial Reform, 20 March 2017.
[142] Constitutional Procedure Act.
[143] Bruce M. Wilson, "Constitutional Rights in the Age of Assertive Superior Courts: An Evaluation of Costa Rica's Constitutional Chamber of the Supreme Court", *Willamette Law Review*, 48 (2012), 451–471.
[144] Resolution No. 2003-02771.
[145] Bruce M. Wilson (2012).
[146] Decision 61-2009.

when the Legislative Assembly adopted Decree 743 to heighten the voting threshold of the Constitutional Chamber from four-fifths to unanimity. Given that the court had been divided four to one in many cases,[147] the Decree was seen to paralyse the court.

But the story did not end there. The Decree was repealed in only two months, for two reasons. First, there was a widespread discontent with the government, concerning issues varying from social justice, corruption, to the suppression of the Constitutional Chamber.[148] Second, the Chamber relied on the four-fifths rule stipulated in the Constitution to declare the Decree unconstitutional. The government had no option but back down on this particular issue. The four-fifths requirement has been sustaining since then.

This case not only illustrates that voting rules are always used by politicians to quiet the junkyard dog that bites, it also demonstrates that courts could strike back by its means, especially when the public is willing to offer them protection. Although the decision-making rule of the Constitutional Chamber is quite technical, or even trivial in some views, the court could be an effective check on the corrupt officials, and therefore it matters to some Salvadorans.[149] It seems that if the voting rule in judicial review would once again change in the future, it would only be loosened rather than tightened.

4.5 Conclusion

In this Chapter, we go through the development of supermajority rules in selected countries by looking into selected cases, and what we see is a rather complicated picture.

First, the voting rules alone could hardly tell us how the judicial power would be affected. In the worst case, as in Peru, politicians could obstruct the courts by controlling the appointment of judges. Although this external control or court-packing is by no means something new in the interaction of the governments and the judiciary, the supermajority rules could in particular circumstances let the appointing actors more easily to control the courts by sending in a few loyalists.

However, more often than not courts with supermajority rules found their ways to adapt and play a role. For instance, the Council of Grand Justices in Taiwan enlarged its scope of power by interpretations in 1980s, and the Mexican Court introduced a diffuse model of conventionality control, and the Czech Court sometimes ignored the requirement of nine votes to deviate previous legal opinions. To understand this, we have to narrow our scope to focus on deliberation models and decision-making rules in different courts, such as the peculiar model of the Council in Taiwan that it could not make any decision unless votes of three-thirds judges were gathered, while in all other countries courts could hand down rulings to uphold the statutes by a bear majority, a rule that reflects a presumption of constitutionality.

Furthermore, in countries where courts were imposed with supermajority rules, the governments, and the public sometimes, had once found it a proper way to regulate the judicial power, but years later not few of them opted to lower the thresholds, and different sectors even shew their support and

[147] Ellen Moodie, "Democracy, Disenchantment, and the Future in El Salvador", in Jennifer L. Burrell and Ellen Moodie, ed., *Central America in the New Millennium: Living Transition and Reimagining Democracy* (New York: Berghahn Books, 2013), p. 108.
[148] Ibid., 109–111.
[149] Rachel E. Bowen, *The Achilles Heel of Democracy: Judicial Autonomy and the Rule of Law in Central America* (New York: Cambridge University Press, 2017), p. 215.

trust in the courts. El Salvador, and in fact the Polish constitutional crisis, illustrates that voting thresholds could be loosened easier than tightened. By saying this, it is not to argue for majority rules over supermajority ones, it only means to imply the dynamic changes in those countries we have discussed.

Chapter 5: Towards a Theory of Supermajority Rules in Judicial Review

After the long journey going through the adoption and development of supermajority rules in judicial review, this Chapter reassesses the debate over the potential and supposed shortcomings of supermajority rules, and formulates a theory. The discussion inevitably touches on the very nature of judiciary.

5.1 The Myth of Paralysing the Courts

5.1.1 Spectrum and Scope

First of all, are supermajority rules used to paralyse the Courts? Yes, in some cases. If a requirement of unanimity could also be counted as a supermajority rule, the Salvadoran government who tried to heighten the voting threshold to unanimity in 2011 is a clear example that governments use voting rules to silence the judiciary. After all, the unanimity rule under which only one judge is enough to decide the outcomes tells everything. However, the spectrum of supermajority rules is wide, and in cases like the Czech Constitutional Court, only one more vote than simple majority in this 15-member Court is needed to annul statutes or adopt new legal opinions. From this relatively low threshold, it is hard to describe the Court is designed to be limited.

Russia, when it introduced the two-thirds voting rule after the constitutional crisis, in some sense could be regarded as another example to curb the judicial power. It is in some sense only because the political dynamic in 1994 was not that straightforward. At least certain blocs in the parliament were willing to keep the Constitutional Court as their political insurance to counter with Yeltsin, and therefore by passing the supermajority rule they were at the same time reaffirming the indispensable role of the Court, not to mention the consent of the judges to adopt the two-thirds rule.

What is more, in many cases supermajority rules were not a retaliation nor a means to stifle the Courts. On the contrary, the introduction of supermajority rules could be seen as moderating the empowerment of the Courts during the process of transiting to constitutionalism. Important examples are the Ibero-American countries. To illustrate this point, we have to pay attention to the scope of jurisdictions that the supermajority rules apply in. Two patterns could be observed. First, when the Courts were allowed not only to issue *inter partes* rulings but also decisions with general effects such as statutes annulment, supermajority rules emerged. Second, in some instances supermajority rules only apply in certain jurisdictions of the Courts, for example in establishing precedents. Having said that, supermajority rules seem regulating specific judicial power more than being hostile to the Courts as such. This concerns the role of judiciary, to which we will come back later.

5.1.2 Agency of the Courts

An important reason why supermajority rules are not a determinant of judicial power is the agency of the Courts. Judges, just as other actors, have their agency, and would sometimes go against the

given structures. First, judges enlarged the scope of judicial power, especially in matters concerning rights protection, as individuals' petitions in Taiwan and conventionality review in Mexico illustrated. Although the judiciary is deemed the least dangerous branch of government, meaning that they could do nothing but compose judgements, courts do define their role through doctrinal development, sometimes shrewdly, to find a workable counterbalance to the pressures of political branches[150].

Second, judges sometimes vote strategically in order to be effective and make decisions that are important in their views. This could be seen in the Mexican electricity case that a vote change resulted in a blow to the government. Third, the majority would tone down their legal opinions to get support from the minority, so that there would be a qualified majority that could hand down legally binding rulings. In the Council of Grand Justices in Taiwan, a court with *ex ante* deliberation model, it is said that there have been reporting judges from time to time who were able to formulate judgements that could be agreed on by judges who were of different opinions.[151]

Structure is easy to observe, while agency is hard to examine. How do supermajority rules affect courts in exercising their judicial power? Unless we take a process-tracing approach to study the temporal changes of courts, the aspect of their agency could sometimes be overlooked.

5.2 A Holistic Picture of Supermajority Rules

5.2.1 Appointing Mechanisms

It is impossible to evaluate supermajority rules, or any voting rules, without having a look at institutional designs. First and foremost, appointing mechanisms of judges in apex courts matter, and they matter in two ways.

The first dimension of appointing mechanisms is who. Who are the appointers? In many countries, judges are appointed by the president upon approval of the parliament. This mechanism involving two political actors undoubtedly could lower the risk of hegemony in the appointing process. However, there are many cases that the party of the president is at the same time the majority in the parliament, not to mention that congresses are dominated by the same party of prime ministers in parliamentary system, therefore the judicial appointment is *de facto* controlled by one single political actor. A usual solution is to require a supermajority, say two-thirds, in parliament to confirm the nominations of the executive, for this would increase the chance that the appointments need cross-party consent, and therefore the appointees would be more likely a moderate and willing to form consensus with their colleagues on the bench in the courts. The two-thirds requirement for approving judicial appointments in Mexico is at least in part a reason why there are not four hardliners in the Court always blocking the other seven to hand down effective rulings.

In some other, and fewer, cases, judges are nominated by the president and approved by an organ other than the parliament. Such as in Taiwan, the appointment of Grand Justices is confirmed not by the Legislative Yuan, but by the Control Yuan. For legislature, in theory, is supposed to be most hostile to constitutional review, which could annul their legislations, this kind of appointing mechanism may also reduce the odds that the parliament would send some loyalists to the court to rig the system.

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[150] John A. Ferejohn and Larry D. Kramer, "Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint", *New York University Law Review*, 77 (2002), 962–1039.
[151] Yueh-Sheng Weng (2008).

The second dimension of appointing mechanisms that is relevant to voting rules is the term length. Why was the Nicaraguan Court afraid of court-packing by the new government in 1990 to replace Sandinista judges? It was partly because the then president introduced a provision to stipulate six-year terms for judges, exactly the same length as the president and the parliament, increasing the possibility that new government would change the composition of the Court at once. On the other hand, if, as in many countries, judges are appointed for a period longer than the other two branches, it would then significantly reduce the capability of the government to install judges who are align with them. Undeniably the high the voting threshold is, the fewer judges the government has to install, this leads us back to the question of the spectrum of thresholds discussed in last part. Two-thirds supermajority of a nine-member court, for instance, does not necessarily give the government an upper hand, so long as the government could rarely appoint more than three judges within its term of office. That said, the broader institution design matters.

5.2.2 Jurisdictions

To have a holistic picture of supermajority rules, one must ask what jurisdictions do the rules apply in. The discussion of scope would not be repeated, but two particular points deserve further consideration. First, in Russia and Taiwan, the Courts could, in theory, make decisions with a simple majority, what they need votes of a supermajority for is to make constitutional interpretation. At first glance, it seems that the provisions are not severely limiting judicial power. But the difference is nominal more than real. In practice, a vast majority of constitutional review involves constitutional interpretation, therefore requiring a supermajority in constitutional interpretation is *de facto* requiring a supermajority in constitutional review.

Second, supermajority rules are sometimes used in precedent-setting. This usage is of two forms. In one form, courts need a supermajority to overturn precedents, just as in Czech, the Constitutional Court has to gather at least nine votes to deviate from previous legal opinions. There is yet another kind of usage, namely a supermajority for courts to establish binding precedents. Nothing could demonstrate this better than the Mexican *jurisprudencia* practice. In fact, in Brazil, the legal opinions of the Supreme Court did not effectively bind lower courts before 2004 as well. Not until Constitutional Amendment No. 45, they introduced a mechanism called *súmula vinculante*, by which the Court could duly establish precedents by a supermajority of eight out of eleven votes.[152] It is therefore hard to say that supermajority rules are uncommon for precedent-setting. At least not in Ibero-America.

Countries in common law tradition may be not aware of the binding effect of judicial decision, as they are too familiar with the principle of *stare decisis* and sometimes even take it for granted. Yet when we make a reflection, establishing precedent is no doubt a kind of entrenchment, which not only binds the government, but also binds judges to come. Thinking in this way, "it is possible that courts could be the subjects of entrenchment in a similar manner to legislatures", Nicholas Barber, a British jurist, says.[153] By saying this, it does not mean to argue for supermajority rules in precedent-establishing, at least not in this part. Instead, it means to make clear that jurisdictions that voting rules apply in are a crucial aspect that must be taken into account.

[152] Maria Angela Jardim de Santa Cruz, and Oliveira Nuno Garoupa, "Stare Decisis and Certiorari Arrive to Brazil: a Comparative Law and Economics Approach", *Emory International Law Review*, 26 (2012), 555–598.
[153] N. W. Barber, "Why Entrench?", *International Journal of Constitutional Law*, 14 (2016), 325–350.

5.2.3 Deliberation Models and Dissenting Opinions

Deliberation models matter, as the unique model of Taiwan has shown. Putting aside the Council, and go back to the Mexican electricity case in which a judge changed her vote to result in a qualified majority, we may wonder if the Mexican Supreme Court was not deliberating in *ex ante* model but an *ex post* one, in which judges cast their vote before formulating their reasoning in detail, would it still be possible for the judges to make an effective decision? In general, judges deliberate and make their decisions behind closed doors, it would be hard for outsiders to evaluate how possible a supermajority consensus could be formed, but the idea is that deliberation models favouring second thoughts are essential especially for judicial review with supermajority rules.

Furthermore, allowing concurring and dissenting opinions could also be beneficial to reaching a *per curiam* opinion. As in courts with simple majority rules, different opinions are not uncommon. This could be well illustrated by the *Furman* case in the US Supreme Court, and also the Mexican abortion case in 2008. Concurring opinions especially could hold judges of different viewpoints together to hand down the same ruling, while each expressing their diverse reasoning. In courts with supermajority rules, this particularly matters.

Yet one may also argue in the contrary way, suggesting opinions of a simple majority which are not legally effective under supermajority rules would only make things complicated. And this exposes the unfeasibility of supermajority rules. To this point we now turn.

5.3 Reassessing the Debate

5.3.1 Confusion

First and foremost, there could be confusion only in courts where judges could hand down decisions even if no side could gather votes of a supermajority. If courts could do nothing but put disputing cases on hold, there is no confusion. Even when there are decisions of a simple majority that have no binding force, in other words the statutes in review still stand, just as the Korean ruling on adultery in 2008, what we could see is the fragmented opinions of the Court. Nothing more, and nothing less. This in nature is not different to other decisions of bear majority in courts with simple majority rules, such as the five to four voting in the American same-sex marriage case in 2015, which also stirs controversies in the country. Both the Korean and American cases do bring confusion to the public in similar vein, for the confusion is not due to voting rules, but the quarrel *per se*.

Having said that, there is no reason why people could not understand why the statute in review still stands given that five judges out of four have already found it unconstitutional. This is in some sense similar to the “new Commonwealth model of constitutionalism”, according to which courts in UK, New Zealand, and Canada could not directly strike down the laws they find unconstitutional.[154] The difference is that in courts with supermajority rules, there are genuinely inconclusive opinions among judges, whereas in the new Commonwealth model, the inconclusiveness lies between the judiciary and the parliament. Whether courts should be deferential in cases of reasonable

[154] Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (New York: Cambridge University Press, 2013).

disagreements or not? Before taking up this fundamental and crucial question, we first examine two supports for supermajority rules.

5.3.2 Consistent Adjudication

From the mechanisms of Mexico, Brazil, and Czech, it could be seen that supermajority rules are sometimes adopted to enhance consistency of adjudication. As Vojtěch Šimíček, a judge of the Czech Constitutional Court, puts it, judges from time to time face with "non-uniformity", that is, opinions in case law stand against each other.[155] A qualified majority stipulating that judges could deviate from previous legal opinions only when at least nine judges are concurring is thus one of the solutions to encourage consistent jurisprudence.

One might argue, as Michael J. Gerhardt does, that supermajority rules for overturning precedents may preserve erroneous case law, for problematic precedents would remain in effect as long as the required number of votes are not reached.[156] But the same logic could be applied in simple majority rules as well, that is, unless there are five votes, a nine-member court is unable to correct an error in case law. The problem, then, is that supermajority rules would make changing constitutional doctrine more difficult, and give simple majorities an advantage in enabling their decisions to become entrenched.[157] In some mechanisms, yes. But it is not necessarily the case. As what we have seen in the mechanisms of *jurisprudencia* in Mexico and *sùmula* in Brazil, two countries without the doctrine of *stare decisis*, only a supermajority could establish binding precedents, and therefore they do not have Gerhardt's worry.

It is apparent that supermajority rules mean something different for the civil law tradition from that for the common law tradition. Just as in Brazil, where judicially-created rules are enshrined in the *Súmula* only after the case law has "firmed up",[158] the lack of binding effect of concrete judicial review had once produced backlogs and overwhelmed the Court's docket,[159] and therefore the Supreme Federal Tribunal introduced an adapted version of doctrine of precedent in 1964, before the practice of *súmula* has gradually spread to other courts. In some settings, supermajority rules could and do make adjudication consistent.

5.3.3 Fostering Deliberation

"The broader the agreement among the justices, the more likely it is a decision on the narrowest possible grounds," John Roberts, the Chief Justice of the US Supreme Court, has once said.[160] His implication is twofold. First, consensus among judges who are of diverse opinions is possible. Second, the overlapping consensus is always a narrow opinion, rather than one of a broad scope. The difference between majority rules and supermajority rules, then, is that finding a common ground is voluntary under the former, but is mandatory under the later if courts are not content with being ineffective.

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[155] Vojtěch Šimíček (2018).
[156] Michael J. Gerhardt, *The Power of Precedent* (New York: Oxford University Press, 2008), pp. 104–106.
[157] Ibid.
[158] Keith S. Rosenn, "Civil Procedure in Brazil", *American Journal of Comparative Law*, 34 (1986), 487–525.
[159] Maria Angela Jardim de Santa Cruz, and Oliveira Nuno Garoupa (2012).
[160] "Roberts Seeks Greater Consensus on Court", Associated Press, 21 May 2006.

So considering, the argument that according to Condorcet theory majority rules are adequate for courts to reach the right answer is misplaced. Supermajority rules are not in a better position to find the right answer, but to reach an overlapping consensus of more judges, and hence a consensus that is narrower and more precise. It is also incorrect to suggest that supermajority rules by empowering minority votes over majority votes tend not to foster deliberation.[161]

Undoubtedly courts are like a black box, outsiders could only know the end-product of the intra-court bargaining process. Yet as the Council of Grand Justices in Taiwan and the Mexican Supreme Court demonstrate, in certain deliberation models supermajority rules do not hinder decision-making, instead they could result in judgments that are more mild and moderate.

5.3.4 Weak Judiciary or Judicial Deference?

Is a court that seldom issues binding rulings good? Or, is a court that makes narrow decisions desirable? Those whose answers are positive would describe this as judicial deference, while those whose answers are negative label it a weak judiciary. For the latter, courts are like fire-alarm, and its main function is to indicate when the government is overstepping its legitimate power and coordinate popular action against usurping the government.[162] However, increasing the voting threshold is not equal to disabling the fire alarm entirely, instead it is fine tuning its sensitivity so that the alarm would be activated in certain circumstances, and not be like a "police-patrol" system of oversight. How high the sensitivity should be is open for discussion, but it is unwise to think that all supermajority thresholds are not feasible. Moreover, just as the four judges in a nine-member court could pen their persuasive dissenting opinions, minority judges in courts with supermajority rules could also dissent from the majority and thus send a signal to the public.

In some views, the supermajority requirement of the Korean Constitutional Court has had an unintended consequence of letting the Court to signal its jurisprudence to other branches of government by bare majority decisions.[163] It may be exaggerating the effect of inter-branch dialogue, for in many cases governments would not revise the statutes or policies so long as they are not duly required to do so, just as the Korean adultery law was eventually repealed by the Court rather than revised by the government, yet it is true that courts with supermajority rules could signal its changes in attitude, and therefore courts could shift incrementally in the pace more align with the society instead of a radical change. Having said that, it is a prudent judiciary more than a weak one.

It is true that weakness is a comparative concept, courts being imposed with supermajority rules are sometimes in an inferior position to the governments. However, its the gesture of the government, not the voting rules *per se,* makes courts seem weak. What is more, as many cases have shown, restrained courts could nevertheless find their role in the legal and political landscape, in other words, they are after all a "junkyard dog". The Russian Constitutional Court is yet another example illustrating that despite political pressure and structural constraints, the Court has been able to adapt

[161] Jonathan Remy Nash, "The Majority That Wasn't: Stare Decisis, Majority Rule, and the Mischief of Quorum Requirements", *Emory Law Journal*, 58 (2009), 831–888.
[162] David S. Law, "A Theory of Judicial Power and Judicial Review", *Georgetown Law Journal*, 97 (2009), 723–801.
[163] Joon Seok Hong (forthcoming).

the increasingly authoritarian regime under President Vladimir Putin, and remains a "viable and active constitutional review tribunal".[164]

5.4 What is Judiciary?

As the foregoing discussion repeatedly shows, should courts need a supermajority to hand down influential rulings sometimes depends on which tradition we are in. In civil law tradition where there has been no doctrine of precedent, they may find supermajority rules a natural option. It is also about the role of judiciary in a society. In this part, the fundamental question that what is judiciary is further pondered over.

5.4.1 Civil Law and Common Law Traditions

No one would argue against the notion that constitutional designs in nearly all countries are products of political struggle and compromise, including those in Latin America.[165] Yet one must ask why supermajority rules emerge in certain countries but not the others, in other words, why the consensus of the political elites was the adoption of supermajority rules.

Mirjan Damaška has once articulated the differences between civil law and common law traditions, describing the former as a hierarchical ideal that judges are officials using technical norms and adjucaitioin is a somewhat mechanical process of relating facts to norms, whereas the latter as a coordinate ideal that judges apply vague standards of substantive justice and their discretion is an essential accompaniment.[166] Seemingly, it does not tell us much the reasons of supermajority rules. However, because for judges in civil law tradition is a kind of expert clerk, different from the heroes in civil law tradition, it is not surprising that they have not been trusted to review the constitutionality of legislations, and therefore judicial review came late in Ibero-America, with limitations imposed on the courts.[167]

Second, and more importantly, supermajority rules in some sense could be seen as a compromise between civil law and common law traditions. In the last century, there was a stronger trend in the civil law world to give decisions of unconstitutionality *erga omnes* effect, and therefore to consider the institution of some form of judicial review. Given the widespread distrust of ordinary judges and the doctrine of separation of powers, the ordinary judiciary is deemed an unacceptable actor to take up this duty, and therefore the solutions of many European civil law countries were to set up a separate tribunal or a separate system of administrative courts, just as what happened in French and Germany, to conduct the power of abstract review. This could not only preserve the principle of separation of powers, but also could void laws without introducing the principle of *stare decisis* into the legal system.[168]

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[164] Alexei Trochev and Peter H. Solomon Jr., "Authoritarian Constitutionalism in Putin's Russia: A Pragmatic Constitutional Court in a Dual State", *Communist and Post-Communist Studies*, 51 (2018), 201–214.
[165] Daniel M. Brinks and Abby Blass, *The DNA of Constitutional Justice in Latin America: Politics, Governance, and Judicial Design* (New York: Cambridge University Press, 2018), chapter 8.
[166] Mirjan Damaška, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven: Yale University Press, 1981), chapter 1.
[167] John Henry Merryman and Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America*, 4th edition (Stanford: Stanford University Press, 2018), chapter 6.
[168] Ibid., chapter 18.

However, it is not the solution of most Latin American countries. The judicial power of constitutional review is vested in supreme courts or constitutional chamber of supreme courts, both of which are part of the ordinary court system. Although Chile and Peru did set up constitutional courts, Brazil, Costa Rica, El Salvador, Mexico, Nicaragua, and many other countries opted for ordinary supreme courts. At the same time, they imposed constraints on the courts with high voting thresholds. Understanding in this way, it is a plausible account that introducing supermajority rules when courts were empowered with judicial review that has *erga omnes* effect and could annul statutes could be a product of the convergence of the embedded civil law tradition and a strong influence of the American civil law. If this is the case, it could further explain why Costa Rica, a democracy with no junta or authoritarian government as in other cases, adopted supermajority rules for decades, and in other Ibero-American countries, qualified majority rules are still remaining after democratic transition and political alternation.

5.4.2 Check and Balance and Human Rights Protection

Over the past few decades, there have been more countries introducing judicial review and constitutional review, which has undoubtedly change the legal and political framework in civil law tradition. The principle of separation of powers is somehow giving way to the idea of checks and balances, according to which its the responsibility of the judiciary to hold the legislature accountable, to strike down unconstitutional statutes, and ultimately to protect fundamental rights of citizens. Limitations on judicial power therefore sound at odd with the concept of constitutionalism. Nonetheless, it does not follow that any limitation on judicial power is undermining the idea of checks and balances.

In fact, the practice of amparo through out the Ibero-America is in essence a means to protect human rights. Literally the Portuguese and Spanish word “amparo” means remedy, that is, a remedy for the protection of constitutional rights. What amparo and judicial review with supermajority rules in those countries show is the nuance of rights protection and checks and balances. Checks and balances are a vital means for the end of protecting fundamental rights, but not the only way. If well designed, the amparo proceeding is also potentially effective and viable.[169]

Although it is true that by leaving room for, or even encouraging, frictions between institutions, errors could be corrected and institutions could complement each other,[170] therefore setting a high bar for the judiciary may not be necessary. Yet, again, it is one kind of options among many other possibilities. Assuming a common practice in Ibero-American countries could not protect rights adequately is merely an intuition.

5.4.3 Truth-Seeking or Dispute-Solving

The final question of the role of judiciary to be asked is that are courts for truth-seeking, or dispute solving? It matters because as the literature review demonstrates, discussion about majority and supermajority rules in judicial review sometimes concerns how to get the right answers. The underlying idea of the doctrine of margin of appreciation developed in the European Court of Human

[169] Hector Fix Zamudio, “The Writ of Amparo in Latin America”, *Lawyer of the Americas*, 13 (1981), 361–391.
[170] N. W. Barber, “Self-Defence for Institutions”, *Cambridge Law Journal*, 72 (2013), 558–577.

Rights also suggests that domestic courts are in a better position to make a correct decision. On the one hand, proponents of majority rules would contend that, according to Condorcet Jury's Theorem, majority rules could lead us to the right answers, whereas on the other hand, proponents of supermajority rules argue that the legislature knows policy-making better than courts. The notion of truth-seeking seems unable to bring us far. Furthermore, if the task of courts is to seek the truth, it would be understandable why it could be hard for judges to compromise. After all, who could compromise on the truth?

Fortunately, it is not the only conception of the role of judiciary. Courts could also be understood as a dispute-solving institute. Although one would worry that dispute-solving courts are inevitably deferential and weak, for they generally would not touch on structural problems and redesign the system even if it may be rigged,[171] courts could also be determined to settle dispute about statutes and policies between two parties. The idea of dispute-solving is that by recognising value pluralism and the existence of reasonable disagreement, judges are not formulating their theory of justice to bring the society an ideal world in adjudication, and therefore non-ideal compromises are by no means a vice. As a consequence, supermajority rules are not necessarily an obstacle, but a mechanism to advance compromises between plaintiff and defendant, which is usually the government, in constitutional review.

5.5 Conclusion

In this part, in the aid of the comparative study on the adoption and development of qualified majority rules, we reject some myths and intuitions of the shortcomings of supermajority rules in judicial review. Second, by taking various factors, such as appointing mechanisms, terms of office, deliberation models, and scopes of jurisdictions, into account, it is illustrated that supermajority rules could be and are feasible in specific circumstances. What matters is the institutional design in both broad and narrow senses. However, we do not stop there. By further digging into different perceptions of the judiciary, especially comparing and contrasting its role in civil law and common law traditions, we could see that supermajority rules in some Ibero-American countries could be plausibly understood as a balance between the civil law tradition and the influence of judicial review and constitutionalism in common law countries. Ultimately the end of courts is to protect rights and solve conflicts, the means they use is not necessarily one certain kind or another. Could courts with supermajority rules duly fulfil their responsibilities? The answer suggested by this research is yes, at least conditionally.

Having said that, the thought experiment and the suggestion of possibility of adopting supermajority rules in judicial review raised in America could be deemed to be departing from common law tradition, but at the same time the proponents are reflecting and fine tuning the practice of judicial review in their common law country. In this process, we do not have to confine our sight to the American experiences and Anglo-American countries where common law is in practice, or not even limited to continental Europe. After all, no one has to rigidly stick to either tradition. The development of legal regime is always dynamic and influencing each other, as what we have seen in

[171] Michael C. Dorf, "Legal Indeterminacy and Institutional Design", *New York University Law Review*, 78 (2003), 875–981.

Ibero-America. Not to mention there was once the *jus commune* in the Medieval, before the evolution of common law and civil law traditions.[172]

[172] John Henry Merryman, "On the Convergence (and Divergence) of the Civil Law and the Common Law", *Stanford Journal of International Law*, 17 (1981), 357–388.

Chapter 6: Conclusion

6.1 Sign and Design

Supermajority rules are a design, a design of some ambitious politicians to control courts in a subtle way, a way that judges in the courts would not be offended very much, and sometimes are even acquiescent on the thresholds. Supermajority rules are also a design of some civil law countries to moderate the empowerment of courts, to adapt the newly introduced power of judicial review that could annul statutes, and to get along with the new constitutional order.

On the other hand, supermajority rules are a sign, a sign of the mechanical role of courts in civil law tradition, of the distrust of judges, and yet a sign of the compromise of the embedded civil law tradition and the irresistible influence of judicialisation in the the civil law tradition. Supermajority rules are also a sign that some common law jurists reflect on their experience in judicial review, and start thinking more possibilities of the system of justice. To understand how qualified majority rules are being developed in real cases, as what this study does, is the beginning of rethinking what is the judiciary, and how could it be.

6.2 Methodology Reflection

This research focuses on the voting rules in judicial review of apex courts, an area that is so under-explored that many scholars are even not aware of the fact that more than a dozen of countries did and do use supermajority rules.

Due to the low transparency of many courts, and partly because the instances of countries are not a large number, this research opts for a process-tracing approach to study the adoption and development of supermajority rules in selected countries. By the diachronic comparison, this research illustrates some similarities of the context and development, such as judicial empowerment and the agency of courts, and some differences among countries, for instance, their deliberation models and political landscape.

It is true that scholarship about judicial review is predominantly normative, and the positive aspects are easily overlooked,[173] but it is another question that how should we look into the politics of judicial review and, more broadly, constitutional justice. A positive account is not enough to tell us why political actors in some countries would take supermajority rules as an option to moderate, or curb, judicial power of courts, while many others do not. This research, by examine the adaptation of supermajority rules in Ibero-America and revisiting the civil law tradition, offers an ideational account, that is, it is plausible that the higher thresholds are an alternative for the countries to strike a balance between civil law tradition on the one hand, and the need of establishing precedents and *erga omnes* judicial review on the other hand. Together with the positive aspects, this normative point of view gives us a fuller picture of institutional designs of judicial review.

6.3 Implications for Future Research

[173] Barry Friedman, "The Politics of Judicial Review", *Texas Law Review*, 84 (2005), 257–337.

First and foremost, this research compiles an original list of voting rules in judicial review of 196 jurisdictions, which has great potential to be further studied on. Why presidents of some courts have the casting vote, while absolute majority is necessary in other courts? Why are some decision-making rules stipulated in constitutions, while other in legislations or even court-made rules of procedure? Why are some collegial courts of as many members as 15, whereas some are of as few as three? To name but a few questions that could be raised.

Second, deliberation models of many courts are by and large unclear so far. The most feasible way for outsiders to understand how judges reach decisions is interview, or their first-hand narration. To be more precise, how judges, especially in courts with supermajority rules, persuade each other and form consensus, and how reporting judges in *ex ante* models try to opine judgements that could be signed by a majority, or a supermajority, of colleagues on the bench remain to be seen.

Last but not least, due to limitations of information gathering and, particularly, language barrier, this research could only offer a finite account of how did political actors in selected countries introduce various voting rules in judicial review. How did different sectors think about adopting supermajority rules in many more courts and what were their considerations deserve attention.

Appendix: Voting Rules in Apex Courts *

State	Apex Court	Voting Rule	Relevant Provision
Afghanistan	Supreme Court	Majority	Law on Organisation and Jurisdiction of Judiciary Branch, Article 26
Albania	Constitutional Court	Majority	Law on the Organisation and Functioning of the Constitutional Court, Article 72
Algeria	Constitutional Council	Majority (With Casting Vote)	Regulations, Article 20
Andorra	Constitutional Court	Majority (With Casting Vote)	Qualified Law of the Constitutional Court, Article 31
Angola	Constitutional Court	Majority (With Casting Vote)	Organic Law of the Constitutional Court, Article 47
Antigua and Barbuda	Judicial Committee of the Privy Council	Majority	The Judicial Committee (Appellate Jurisdiction) Rules 2009 #
Argentina	Supreme Court	Absolute Majority	Law 26183, Article 3
Armenia	Constitutional Court	Majority	Constitution, Article 170
Australia	High Court	Majority (Appeal Rejected if Tie Vote)	Judiciary Act, Article 23
Austria	Constitutional Court	Majority (With Casting Vote)	Constitutional Court Act, Article 31
Azerbaijan	Constitutional Court	Majority	Law on Constitutional Court, Article 68
Bahamas	Judicial Committee of the Privy Council	Majority	The Judicial Committee (Appellate Jurisdiction) Rules 2009 #
Bahrain	Constitutional Court	Majority	Constitutional Court Act, Article 72
Bangladesh	Supreme Court	Majority	Supreme Court Rules, Order X
Barbados	Caribbean Court of Justice	Majority	Agreement Establishing the CCJ, Article IV
Belarus	Constitutional Court	Majority (Constitutional if Tie Vote)	Law on the Constitutional Proceedings, Article 75
Belgium	Constitutional Court	Majority	Organic Law, Article 55

Belize	Caribbean Court of Justice	Majority	Agreement Establishing the CCJ, Article IV
Benin	Constitutional Court	Majority	Internal Regulations of the Constitutional Court, Article 21
Bhutan	Supreme Court	Majority	The Civil and Criminal Procedure Code, Article 28
Bolivia	Constitutional Court	Absolute Majority	Law No. 27 of the Plurinational Constitutional Court, Article 29
Bosnia and Herzegovina	Constitutional Court	Majority	Rules of the Constitutional Court, Article 42
Botswana	Court of Appeal	Majority	Court of Appeal Act, Article 9
Brazil	Supreme Federal Court	Absolute Majority	Constitution, Articles 97
Brunei	Court of Appeal	Majority	Supreme Court Act, Article 25 #
Bulgaria	Constitutional Court	Majority	Constitutional Court Act, Article 15
Burkina Faso	Constitutional Council	Majority	Organic Law, Article 18
Burundi	Constitutional Court	Absolute Majority (With Casting Vote)	Constitution, Article 227
Cabo Verde	Constitutional Court	Majority	Law of the Constitutional Court, Article 29
Cambodia	Constitutional Council	Absolute Majority (With Casting Vote)	Law on Organization and Function of the Constitutional Council, Article 22
Cameroon	Constitutional Council	Majority (With Casting Vote)	Law on the Organization and Functioning of the Constitutional Council 2004, Article 13
Canada	Supreme Court	Majority	Supreme Court Act, Article 26
Central African Republic	Constitutional Court	Majority (With Casting Vote)	Constitution, Article 101
Chad	Constitutional Chamber of Supreme Court		
Chile	Constitutional Court	Majority (4/5 for Annulling Statutes)	Constitution, Article 92

China	Supreme People's Court ^	Majority	Some Provisions of the SPC Concerning the Work of the Collegiate Panel of the People's Courts, Article 11
Colombia	Constitutional Court	Absolute Majority	Rules of Procedure, Article 3
Comoros	Constitutional Court		
Congo	Constitutional Court	Majority (With Casting Vote)	Organic Law, Article 25
Costa Rica	Constitutional Court	Absolute Majority	Constitutional Article
Côte D'Ivoire	Constitutional Council	Majority	Proceeding Before the Constitutional Council
Croatia	Constitutional Court	Majority	Constitutional Act, Article 27
Cuba	People’s Supreme Court	Majority	Integration and Operation
Cyprus	Supreme Court	Majority	
Czech Republic	Supreme Court	Majority (9/15 for Annulling Statutes)	Constitutional Court Act, Article 13
Democratic People's Republic of Korea	Central Court ^		
Democratic Republic of the Congo	Constitutional Court	Majority	Organic Law, Article 92
Denmark	Supreme Court	Majority	The Role and Function of the Court #
Djibouti	Constitutional Council		
Dominica	Caribbean Court of Justice	Majority	Agreement Establishing the CCJ, Article IV
Dominican Republic	Supreme Court	Majority (With Casting Vote)	Organic Law, Chapter II Article 1
Ecuador	Constitutional Court	Majority	Organic Law on Jurisdictional Guarantees and Constitutional Control, Article 90

Egypt	Supreme Constitutional Court	Majority	Supreme Constitutional Court Law, Chapter II Article 9
El Salvador	Constitutional Chamber of Supreme Court	Supermajority (4/5)	Judicial Organic Law, Article 14
Equatorial Guinea	Constitutional Council	Majority (With Casting Vote)	Organic Law of the Constitutional Council, Article 24
Eritrea	High Court		
Estonia	Supreme Court	Majority (With Casting Vote)	Constitutional Review Court Procedure Act, Article 57
Eswatini	Supreme Court	Majority	
Ethiopia	Council of Constitutional Inquiry	Majority (With Casting Vote)	Proclamation No. 798/2013, Article 11
Fiji	Federal Supreme Court	Majority	Supreme Court Act 1998, Article 2
Finland	Supreme Court	Majority (With Casting Vote)	Code of Judicial Procedure, Chapter 23
France	Constitutional Council	Majority (With Casting Vote)	Procedure
Gabon	Constitutional Court	Majority	Rules of procedure, Article 23 #
Gambia	Supreme Court		
Georgia	Constitutional Court	Majority	Rules of Court, Article 10
Germany	Constitutional Court	Majority (Constitutional if Tie Vote)	Act on the Federal Constitutional Court, Article 15
Ghana	Supreme Court		
Greece	Supreme Special Court	Majority	Code on the Supreme Special Court, Article 19
Grenada	Judicial Committee of the Privy Council	Majority	The Judicial Committee (Appellate Jurisdiction) Rules 2009 #
Guatemala	Constitutional Court	Majority	
Guinea	Supreme Court		Organic Law 91/08/CTRN
Guinea Bissau	Supreme Tribunal of Justice		Organic Law of Courts #
Guyana	Caribbean Court of Justice	Majority	Agreement Establishing the CCJ, Article IV
Haiti	Supreme Court		
Honduras	Supreme Court	Majority	

Hong Kong	Court of Final Appeal	Majority	Court of Final Appeal Rules, Article 45 #
Hungary	Constitutional Court	Majority (With Casting Vote)	Act on the Constitutional Court, Section 48
Iceland	Supreme Court	Majority	Law on Courts, Article 16
India	Supreme Court	Majority	Constitution, Article 145(5)
Indonesia	Constitutional Court	Majority	
Iran	Supreme Court		
Iraq	Federal Supreme Court	Majority	Law of Federal Supreme Court, Article 5
Ireland	Supreme Court	Majority	Constitution, Article 26
Israel	Supreme Court	Majority	
Italy	Constitutional Court	Majority	General Regulation of the Constitutional Court, Article 6
Jamaica	Judicial Committee of the Privy Council	Majority	The Judicial Committee (Appellate Jurisdiction) Rules 2009 #
Japan	Supreme Court	Majority	Court Act, Article 77
Jordan	Constitutional Court	Majority (With Casting Vote)	Constitutional Court Law, Article 19
Kazakhstan	Constitutional Council	Majority (With Casting Vote)	Constitutional Law, Article 33
Kenya	Supreme Court	Majority (Appeal Rejected if Tie Vote)	Supreme Court Act, Article 25
Kiribati	Court of Appeal	Majority	Constitution, Article 91
Kosovo	Constitutional Court	Majority	Law on the Constitutional Court, Article 19
Kuwait	Constitutional Court		
Kyrgyzstan	Constitutional Chamber	Majority (Constitutional if Tie Vote)	Rules of Procedure, Article 152
Laos	People's Supreme Court ^		
Latvia	Constitutional Court	Majority	Rules of Procedure of the Constitutional Court, Article 6

Lebanon	Constitutional Council	Supermajority (7/10)	Law No. 250, Article 12
Lesotho	High Court		High Court Rules #
Liberia	Supreme Court	Majority (With Casting Vote)	
Libya	Constitutional Chamber of Supreme Court	Majority	
Liechtenstein	State Court	Majority	State Court Act, Article 49
Lithuania	Constitutional Court	Majority	The Law on the Constitutional Court, Article 19
Luxembourg	Constitutional Court	Majority	Law of 27, Article 12
Madagascar	High Constitutional Court		
Malawi	Supreme Court of Appeal		
Malaysia	Federal Court	Majority	Courts of Judicature Act, Article 74
Maldives	Supreme Court	Majority	Judicature Act, Article 6
Mali	Constitutional Court		
Malta	Constitutional Court	Majority	Code of Organisation and Civil Procedure, Article 217
Marshall Islands	Supreme Court		Supreme Court Rules of Procedure
Mauritania	Supreme Court		
Mauritius	Judicial Committee of the Privy Council	Majority	The Judicial Committee (Appellate Jurisdiction) Rules 2009 #
Mexico	Supreme Court	Supermajority (8/11)	Constitution, Article 105(II)
Micronesia	Constitutional Council	Majority	
Moldova	Constitutional Court	Majority (Constitutional if Tie Vote)	Law on the Organisation and Operation of the Constitutional Court, Article 27
Monaco	Supreme Court		Ordinance 2.984 #
Mongolia	Constitutional Court	Majority (2/3 for Reconsideration)	Law on Constitutional Court Procedure, Article 32
Montenegro	Constitutional Court	Majority	Rules of Procedure, Article 67

Morocco	Constitutional Court	Supermajority (2/3)	Constitutional Law on the Constitutional Court, Article 17
Mozambique	Constitutional Council	Majority (With Casting Vote)	Organic Law of the Constitutional Council, Article 33
Myanmar	Constitutional Council	Majority	Constitutional Tribunal Act, Article 22
Namibia	Supreme Court	Majority	Supreme Court Act 1990, Article 13
Nauru	Supreme Court		
Nepal	Supreme Court		
Netherlands	Supreme Court ^		Procedural rules for the Supreme Court #
New Zealand	Supreme Court	Majority	Senior Courts Act 2016, Article 85
Nicaragua	Constitutional Chamber of Supreme Court	Supermajority (2/3)	Organic Law of Judicial Power, Article 26
Niger	Constitutional Court	Absolute Majority (With Casting Vote)	Organic Law on the Constitutional Court, Article 18
Nigeria	Supreme Court	Majority	
North Macedonia	Constitutional Court	Absolute Majority	Rules of Procedure of the Constitutional Court, Article 25
Norway	Supreme Court	Majority (Discounting Most Junior Judge if Tie Vote)	Courts of Justice Act, Article 5
Oman	Supreme Court		
Pakistan	Supreme Court	Majority	Supreme Court Rules, Order X
Palau	Supreme Court	Majority	Rules of Appellate Procedure #
Panama	Supreme Court	Absolute Majority	Judicial Code (I), Article 113
Papua New Guinea	Supreme Court		
Paraguay	Supreme Court	Majority	
Peru	Constitutional Tribunal	Supermajority (5/7)	Organic Law of the Constitutional Court 28301, Article 5

Philippines	Supreme Court	Majority	Constitution, Article VIII Section 4
Poland	Constitutional Tribunal	Majority	Act on the Organisation of the Constitutional Tribunal, Article 106
Portugal	Constitutional Court	Majority (With Casting Vote)	Law of the Constitutional Court, Article 42
Qatar	Supreme Constitutional Court	Majority (With Casting Vote)	Law of the Judicial Authority, Article 19
Republic of Korea	Constitutional Court	Supermajority (2/3)	Constitution, Article 113
Romania	Constitutional Court	Majority	Law on the Organisation and Operation of the Constitutional Court, Article 6
Russia	Constitutional Court	Majority (2/3 for Constitutional Interpretation)	Constitutional Law on the Constitutional Court, Article 72
Rwanda	Supreme Court		
Saint Kitts and Nevis	Eastern Caribbean Supreme Court		
Saint Lucia	Judicial Committee of the Privy Council	Majority	The Judicial Committee (Appellate Jurisdiction) Rules 2009 #
Saint Vincent and the Grenadines	Judicial Committee of the Privy Council	Majority	The Judicial Committee (Appellate Jurisdiction) Rules 2009 #
Samoa	Court of Appeal		
San Marino	Guarantors' Panel	Majority	Regulation 2004, Article 1
Sao Tome and Principe	Constitutional Tribunal		
Saudi Arabia	Supreme Court	Majority	Law of the Judiciary, Article 13
Senegal	Supreme Court		Organic Law on the Supreme Court #
Serbia	Constitutional Court	Majority	Law on the Constitutional Court, Article 42
Seychelles	Supreme Court		
Sierra Leone	Supreme Court		
Singapore	Supreme Court	Majority	Rules of Court #

Slovakia	Constitutional Court	Absolute Majority	Constitution, Article 131
Slovenia	Constitutional Court	Majority	Constitutional Court Act, Article 41
Solomon Islands	Court of Appeal		
Somalia	Constitutional Court		
South Africa	Constitutional Court	Majority	
South Sudan	Supreme Court	Majority	Constitution, Article 126
Spain	Constitutional Court	Majority	Organic Law of the Constitutional Court, Article 14
Sri Lanka	Supreme Court		Supreme Court Rules #
Sudan	Constitutional Court		
Suriname	Constitutional Court	Majority	Constitutional Court Act, Article 24
Sweden	Supreme Court	Majority (With Casting Vote)	Code of Judicial Procedure, Chapter 16
Switzerland	Federal Supreme Court	Absolute Majority (With Casting Vote)	Federal Court Act, Article 21
Syrian	Supreme Constitutional Court	Majority (With Casting Vote)	Law of the Supreme Constitutional Court, Article 3
Taiwan	Constitutional Court	Majority (2/3 for Constitutional Interpretation)	Constitutional Interpretation Procedure Act, Article 14
Tajikistan	Constitutional Court	Majority	Constitutional Law, Article 56
Tanzania	Court of Appeal	Majority	
Thailand	Constitutional Court	Majority	Constitutional Court Procedures
Timor-Leste	Supreme Court		
Togo	Constitutional Court		
Tonga	Court of Appeal	Majority	Court of Appeal Act, Article 6
Trinidad and Tobago	Judicial Committee of the Privy Council	Majority	The Judicial Committee (Appellate Jurisdiction) Rules 2009 #
Tunisia	Constitutional Court	Majority	Constitution, Article 121

Turkey	Constitutional Court	Absolute Majority (With Casting Vote)	Rules of Procedure, Article 57
Turkmenistan	Supreme Court	Majority	Law About the Court, Article 42
Tuvalu	Judicial Committee of the Privy Council	Majority	The Judicial Committee (Appellate Jurisdiction) Rules 2009 #
Uganda	Supreme Court	Majority	The Judicature (Supreme Court Rules) Directions Article 32 #
Ukraine	Constitutional Court	Absolute Majority	Law on the Constitutional Court, Article 66
United Arab Emirates	Union Supreme Court	Majority	Laws of Union Supreme Court, Article 9
United Kingdom	Supreme Court	Majority	
United States	Supreme Court	Majority	
Uruguay	Supreme Court	Majority	
Uzbekistan	Constitutional Court	Majority (With Casting Vote)	Rules of Procedure of the Constitutional Court, Article 64
Vanuatu	Court of Appeal		Civil Procedure Rules #
Venezuela	Supreme Tribunal of Justice	Majority	Organic Law of the Supreme Court of Justice, Article 11
Viet Nam	People's Court of Vietnam ^	Majority	Law on Organization of People’s Court, Article 10
Yemen	Supreme Court	Absolute Majority	Judicature Law, Article 17
Zambia	Constitutional Court	Majority	Constitutional Court Rules Act, Order XII
Zimbabwe	Constitutional Court	Majority	Supreme Court Act, Article 4

* Left blank for inaccessible information
^ No judicial power of constitutional review
# No provision explicitly stipulating the voting rule

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